

SUPERFUND IMPROVEMENT ACT OF 1985

HEARING
BEFORE THE
COMMITTEE ON
ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE
NINETY-NINTH CONGRESS

FIRST SESSION

ON

S. 51

A BILL TO EXTEND AND AMEND THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980, AND FOR OTHER PURPOSES

AND

S. 494

A BILL TO AMEND THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980 TO ASSURE ADEQUATE FUNDING FOR THE CLEANUP OF ABANDONED HAZARDOUS WASTE SITES, AND FOR OTHER PURPOSES

FEBRUARY 25, 1985

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SUPERFUND IMPROVEMENT ACT OF 1985

MONDAY, FEBRUARY 25, 1985

**U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
Washington, DC.**

The committee met, pursuant to notice, at 10:08 a.m., in room SD-406, Dirksen Senate Office Building, Hon. Robert T. Stafford (chairman of the committee) presiding.

Present: Senators Stafford, Simpson, Symms, Domenici, Durenberger, Bentsen, Mitchell, and Baucus.

OPENING STATEMENT OF HON. ROBERT T. STAFFORD, U.S. SENATOR FROM THE STATE OF VERMONT

Senator STAFFORD. Good morning.

The Committee on Environment and Public Works will please come to order. We welcome you all here. We regret the fact that our room is not larger.

Today's hearing is on the proposed extension of Superfund, more formally known as the Comprehensive Environmental Response, Compensation, and Liability Act of 1980. Our only scheduled witness is Lee Thomas, Administrator of the U.S. Environmental Protection Agency. I want to welcome you, Mr. Thomas, along with the members of your staff and any other administration officials who are here with you.

Mr. Thomas has advised me he is prepared to testify and will testify on the two major proposals before the committee. They include the administration bill which I have introduced by request and also S. 51, the Superfund extension bill I introduced earlier this year on behalf of myself and eight other members of the committee.

S. 51 is a bill that combines the language of the legislation approved by this committee last year by a vote of 17 to 1 and some other Superfund amendments approved by the full Senate last year by a vote of 93 to 0.

The administration's bill was made available to the Congress and to the public last Friday and copies of it were made available to members of this committee then. It is our understanding that the bill is based on information contained in the studies required by section 301 of the existing Superfund law. Those studies have been available to the committee and its staff since December, so their content is familiar. However, I expect Mr. Thomas may wish to discuss some of the specifics involved.

It is the hope of the chairman that the committee will be able to stick to its schedule on Superfund that was announced 2 months ago, that is, we will complete our hearing today and begin markup

tomorrow, continuing Thursday and Friday with the goal of reporting the bill by March 1, and the end of this week.

I realize this is an ambitious schedule and, as always, the chairman very obviously will be governed by the wishes of a majority of the members of this committee. I would observe, however, that the committee began work on this reauthorization almost exactly 1 year ago. Our first hearings were held 11 months ago, and last year's bill, S. 2892, was marked up and ordered reported 5 months ago.

There is little that is new before us. The committee bill is well known to everyone and the administration's views are also well known to all. The administration's views have been able presented in testimony and commentary given to us by Mr. Thomas and his staff.

The section 301 reports, which are the basis of both S. 51 and of the administration proposal, were formally provided to the committee almost 3 months ago. Informally, their content had been provided to the committee and its staff almost 6 months ago. That was the testimony of Mr. Thomas before the Senate Finance Committee last year, and I say presented to us because our committee, except for three members who have left, is the same committee that worked on this bill last year and there are no new members on the committee.

Our target of reaching a decision by the end of this week, it seems to me, is neither overly ambitious nor unrealistic. It will be the conclusion of a process that began a year ago and, of course, it is necessary for us to act without delay if we are to enact new legislation by September 30 of this year when the current Superfund bill expires.

I have discussed this schedule with Mr. Thomas and, as always, he has promised his help and cooperation. He will be unable to be with us tomorrow because of a previous commitment, but he and members of his staff will be with us during our markups on Thursday and Friday. On those days, I expect we will continue our committee practice that has given Mr. Thomas the freedom to provide us with any technical assistance we need during markup and also with the freedom he has exercised in the past to provide us with his comments and policy views and those of the administration. In the event that we cover any ground on Tuesday in this absence that he considers merits comment, we can expect to hear that comment on Thursday or Friday.

All of which is by way of saying that I anticipate that we can stick to our schedule and still provide a thorough airing of the subject matter from all viewpoints.

We have only 7 months until the expiration of Superfund. And, of course, whatever legislation this committee recommends will have to go to the Senate Finance Committee for consideration of the revenue raising components. Our experience of last year has demonstrated that that is no simple task. Then the bill will have to go before the full Senate for decision and then to a committee of conference, so we can ill afford any delay.

That is not to say that I expect this committee's work on this subject to be completed on Friday. We will probably still have to visit one or two issues, particularly those dealing with insurance.

However, those issues are not ripe for solution at the present time. The insurance industry, I might say, is not sure what sort of help, if any, they need. Nor are they so central to Superfund that they should be permitted to hold up action on this reauthorization. I would expect we would be ready to deal with those issues during March so that whatever solutions we reach can be joined with the bill before it is taken up on the floor of the Senate. I am confident we can work out such an arrangement.

Before I close, let me say that I believe that last year's bill was a good bill and one that was arrived at in the best tradition of this committee. Not all the members of this committee were totally pleased with all of the bill. For some members, the bill does not go far enough. For others, of course, it goes too far. But all of the members of this committee received a full and fair hearing on their views. It is a way this committee has done its business on important and controversial matters since I have been a member, and I am proud of that process and of the conduct of the members of this committee in supporting the final product.

Last year's bill, reintroduced this year as S. 51, had broad support at the end of the process. The vote was 17 to 1 in favor of recommending the bill to the Senate. As I pointed out, all 15 members of the current committee were members of the committee last year, and 14 of those members voted for the bill.

By sticking close to the central and important features of this bill, it is the hope of this Senator that we can continue to hold the consensus that carried us so close to Senate action last year.

It is my view that the committee would be wise to continue to give its support to the bill that was forged in the crucible of our committee debate last year. The bill has neither the scope nor the funding resources this Senator would prefer to see, but I shall defend the committee's provisions during these markups against efforts to increase or decrease either. I hope other members will agree that it is the best course of action at this time and under the circumstances in which we now find ourselves.

Senator Bentsen, do you have an opening statement?

Senator BENTSEN. Yes, I do. Thank you very much, Mr. Chairman.

OPENING STATEMENT OF HON. LLOYD BENTSEN, U.S. SENATOR FROM THE STATE OF TEXAS

Senator BENTSEN. Mr. Chairman, I think it is unfortunate, I think more than that, I think it is tragic that society has allowed conditions to deteriorate in our country to the extent to where we now need a Superfund. Although it is too late for many of the innocent victims, a resolution to the problem caused by thousands of dangerous waste sites is now a great national priority.

There are few people that would argue against the reauthorization of the Superfund law, and most of us are certainly in agreement that a much larger fund is necessary to accomplish the job. But after that the consensus begins to fall apart.

In December of 1984, an EPA report estimated that cleaning up 1,500 to 2,000 sites would cost \$11.7 billion. Administrator Thomas has said that between \$800 million and \$1.2 billion per

year is about the most that the program could absorb without wasting funds.

The House last year passed legislation which would have raised \$10.2 billion for fiscal years 1986 through 1990. The Federal contribution from the General Treasury would have amounted to \$2.3 billion, and taxes on petroleum and chemical feedstocks would have provided \$7.9 billion. The 5-year, \$7.5 billion Senate Superfund reauthorization bill was reported from this committee and then went to the Finance Committee, and it died. But you have to remember that that happened in the last weeks of the session.

You also have to look at the membership of this committee and the membership of the Finance Committee, and you will find quite a number of the members of this committee are on the Finance Committee and who have a very active interest in seeing that we accomplish what has to be done on their part of the jurisdiction.

My point is that we all know that the fund must be and will be expanded, but as more revenues are required, they must be raised with a full recognition that a more equitable revenue base is necessary. I am pleased that the administration has presented formal Superfund legislation. Like most other members, there are portions of it with which I agree and there are others that I am going to question and try to find out how you arrived at that point of view. Most notably, I question some of the tax consequences and the proposal they are in.

Mr. Chairman, when the current law was in its infancy, the revenues it required could be collected without significant side effects. At this time, however, the narrowly drawn feedstock tax places an unfair economic burden on certain chemicals and areas of our national economy.

For example, there are estimates that 50 percent of the petrochemical feedstock portion of the tax is raised from plants in Texas. This industry has experienced some very severe economic difficulties over the past several years. Some of the highest unemployment figures in Texas are registered where there is the highest petrochemical concentration.

I fully expect that the domestic petrochemical industry will be faced with significant economic problems during at least this next decade. Many of these problems will come from production of petrochemicals in foreign countries, particularly Saudi Arabia, Kuwait, Canada, and Mexico. It is not to the benefit of any area of our Nation for us to encourage the production of these chemicals outside of the United States, a result that reduces both jobs and revenues, but that is the effect of the current system that we have.

We must also consider the waste end tax. Senator Moynihan and I have been working on such a proposal which we project will raise about \$300 million a year. So, obviously, we must also look to a broader based source of funds if we are to meet this Nation's important Superfund goals.

For all of these reasons, I had looked forward to a strong, commonsense approach from the EPA. From my preliminary understanding of the administration proposal, I think the administration had appropriately frozen the feedstock tax at its current levels. This minimizes the potential for damage that this tax presents.

Beyond that, however, I am concerned over the proposals. The EPA proposes to raise \$600 million from the waste end tax, twice the amount Senator Moynihan and I found feasible. I am going to be very interested in seeing the details on how this can be collected without adversely altering the disposal and treatment of waste or creating economic hardships that discourage domestic production of certain products.

While the administration has made some progress toward identifying alternatives for the revenue needed for the Superfund, I am disappointed that the proposal fails to include a broader based revenue source that is both necessary and fair. That means it will be up to the Congress to take the lead in that regard and, finally, it will be the Finance Committee.

What we do in this committee with the kind of background and expertise that this committee and its staff has will have a very substantial influence on what the Finance Committee has to do. Hopefully, we can do more than what I think is, at the present, a very lackluster proposal.

Thank you very much, Mr. Chairman.

Senator STAFFORD. Thank you, Senator Bentsen.

Senator Mitchell, do you have an opening statement?

Senator MITCHELL. I do, just a brief statement, Mr. Chairman. Thank you.

**OPENING STATEMENT OF HON. GEORGE J. MITCHELL, U.S.
SENATOR FROM THE STATE OF MAINE**

Senator MITCHELL. I commend you, Mr. Chairman, for expeditiously scheduling this committee's activities on the reauthorization of the Superfund law. Prompt action is necessary if we are to complete work on this legislation this year without any disruption in the program.

The bill we will consider tomorrow at the markup would reauthorize the Superfund law at a level of \$7.5 billion over 5 years. It is clear that even this increased funding will not complete the task before us.

Since the Superfund law was first enacted in 1980, EPA has undertaken a comprehensive inventory of hazardous waste sites across the country. It is now estimated that there are up to 22,000 potentially hazardous waste sites in the United States.

If EPA's current Superfund level of activity is to be continued, long-term cleanup can be started at approximately 115 sites each year. Even continuation at this pace requires the kind of funding increase approved by this committee last year.

In preparation for our decisions this week will receive recommendations today from the administration on its view of the Superfund program and its future. I look forward to hearing from Mr. Thomas whom we have all come to respect so much. I know that all members of the committee will consider carefully the administration's recommendations.

Ultimately, we will have to make a determination as to the scope of the program and the pace of the cleanup activity over the next 5 years. We will have to balance the administration's proposals against the clearly unmet needs in this area all across the country.

That will not be an easy task. We must keep in mind throughout this debate that we represent all Americans, because all Americans are affected by this crisis and by the decisions we make to deal with it.

Thank you, Mr. Chairman.

Senator STAFFORD. Thank you very much, Senator Mitchell. Senator Domenici?

**OPENING STATEMENT OF HON. PETE V. DOMENICI, U.S. SENATOR
FROM THE STATE OF NEW MEXICO**

Senator DOMENICI. Mr. Chairman, first, I, too, commend you for expediting the process. I said 3 or 4 weeks ago that I was for this and, obviously, I commend you. I have a couple of concerns.

I have been told everywhere that I turn, that in terms of trying to reduce the deficit, a tax is a tax is a tax. No matter what you talk about, taxes are allegedly off limits. I am not suggesting that I agree with that 100 percent, but I do believe that there is some kind of concern around here that we not distort what is already a very difficult and fragile American economy.

I don't think there is any difference in taxing, at a very high rate, certain specific industries versus any other tax. So, my concern will be to join with the chairman in trying to get a bill, but equally I have a concern that we not pass a bill assuming that the General Treasury is going to come up with a substantial portion of the payment because if we start that, I can tell you we can find reasons to justify additional taxes.

I am hopeful that there will be some serious consultation with the Ways and Means Committee and Finance Committee so that we don't wash our hands of this by passing a bill that can't be funded. I don't know what that is yet, but clearly that is an important consideration.

Second, I think we ought to try to produce a bill that can become law. I think that is the final test here. I am sure the President, if the Administration has followed up on what he told us a few weeks ago, Mr. Chairman, he is presenting something that the President will sign. I don't know whether he is prepared to tell us that if we change it in any respect it won't be signed, but I think the chairman has expressed to me a willingness to work with the White House on the basis that he wants a bill the President can sign.

I don't think there is any doubt that we don't want to waste our time, and I don't think there is any doubt that the President is pretty serious about his ideas that he doesn't want any new taxes at this point and that we won't sign a bill that expects more than we can really accomplish.

I have some interests much like the Senator from Texas. I share his concern as to who we impose the tax on. I think it is a very difficult situation in the petrochemical industry. I don't have them, Senator, as you do, but we do provide some of the basic materials that go to the petrochemical industry. I would just say I, too, have an interest in seeing that we don't tax domestic industries and leave foreign ones exempt where they are already more than competitive and where we are losing our industries. I cite that only because copper does concern me. We have never considered copper to

be taxable, but the House has. I am not going to burden the committee now with the rationale on why that would be absolutely counterproductive. That isn't my primary concern at this point.

Frankly, I believe we can pass a bill that will get on with some significant cleanup. Whether we can do everything that everybody can imagine we ought to do, I don't know. It seems to me we can't, but I will cooperate as much as I can.

Thank you, Mr. Chairman.

Senator STAFFORD. Thank you, Senator Domenici.

Senator Durenberger?

**OPENING STATEMENT OF HON. DAVE DURENBERGER, U.S.
SENATOR FROM THE STATE OF MINNESOTA**

Senator DURENBERGER. Mr. Chairman, I had the opportunity, as did other members of the committee, over the weekend to review the administration's bill. It is not a bombshell. There are many sections of the legislation which could be supported by everyone on this committee. Many sections are coincident with the bill that we reported out last year from the committee. Many sections would provide programmatic improvements over existing law.

However, if it is not a bombshell—I see our colleague from the House, Jim Florio, here—it is also not a valentine's day present to the Superfund program either. As I read the bill, I had the feeling that maybe the administration wants to pull back, that maybe it wants to make Superfund a subtitle of RCRA which most certainly was not the intent of Congress when Superfund was adopted in 1980. Despite its common name, Superfund is more than a tax to clean up dumps.

The bill I saw was disappointing in three respects in particular. I will be brief.

First, it attempts to deauthorize many of the activities which are authorized under current law. Some may think that CERCLA is not the appropriate authority to use on asbestos in schools or acid rain, but most are surprised, I am sure, by the suggestion we should have to prove a linkage between a hazardous waste facility and a threat to public health or the environment before the fund can be used in response.

For instance, in Minnesota, at a site called New Brighton, we have drinking water contaminated by the industrial solvent TCE. It appears that the likely source of the contamination was hazardous waste disposal site at the nearby Army munitions facility.

At another Minnesota city, Long Prairie, we again have contaminated drinking water, again by TCE, but the most likely source is septic tanks. In California, in the Silicon Valley, the drinking water of 400,000 people was contaminated again by TCE, but this time the release was from underground storage tanks.

What is interesting about all three of those sites, all presenting a threat to human health in the same way, all resulting from contamination by the same chemical, TCE, is that under the administration's proposed Superfund Program, a response would only be authorized at the New Brighton site and then only if this Senator and whoever else he can marshal can go to war with the U.S. Army and get them to agree that their disposal site caused the con-

tamination which, in 10 years, they have been unwilling to do. So, if I am wrong in that reading of the bill, I would hope, Lee, that you can educate me during the course of your testimony.

The second disappointment came when I read that the administration is proposing a \$600 million waste end tax. When I saw the President's budget earlier this month and his proposal that Superfund be authorized at \$5.3 billion over the next 5 years, I was pleased. Now I find that the administration does not appear to have that intention.

The feedstock tax, a reliable and stable source of revenue, is not slated for increase. The bill holds general revenues out of the fund altogether, if I read it correctly. So, if the waste end tax does not work, and we sure don't know that it will, Superfund may actually have fewer resources than it does under current law. That bothers me.

Finally, I was disappointed by the projection which indicates almost no recovery from responsible parties. Under the administration's budget, only \$100 million per year is projected for revenue from interest on the fund and recoveries of cost from responsible parties. That certainly does not reflect aggressive enforcement, although watching the Agency at work, I find them fairly aggressive.

That means that much less than 10 percent of Federal costs will be recovered, and that is just not tough enough for me.

So, Mr. Chairman, I, like others, want to commend you for putting us on a quick Superfund schedule. I can't find anything novel in the bill that would cause us to slow down this process much. I will vote against any amendments that will reduce the scope of existing law. I agree with my colleague from Texas that this committee plays a very important role, and even though we are both on the Finance Committee, I am not anxious to see us forgo our role and pick it up again with a different set of hats on, although when it does come to the Finance Committee, I intend to support amendments that will strengthen the program by putting the tax on a more stable basis than it is on today.

Thank you.

Senator STAFFORD. Thank you very much, Senator Durenberger.

The Chair wants to note that a very able Member of Congress who is chairman of one of the House committees that will be concerned with this question is here with us observing the comments and will be observing the statements by Administrator Florio, we are very happy you are here with us. This will give you some sense of the difficulties that we are facing over here as we work together to try to get a bill this year.

I think once we have completed the work on this bill, your chairman would, if it seems appropriate, consider a hearing later on with respect to the possibilities and the questions of different tax options that might be available to us and to us through the appropriate committees that will consider the tax matters.

Having said that, I think, Mr. Thomas, we are ready for your statement and discussions.

The Chair would like to make one additional comment and, unfortunately, some of the members who are involved are not here and some of the staff who were involved are not here. The Chair wants to express his appreciation. Last Saturday afternoon, things

were in too much of a hurry to be able to have time to do it, but the Chair wants to express his appreciation to the members of this committee and to the staff who made it possible for the very expeditious way we were able to pass a very important bill, the interstate cost estimate and substitute interstate cost estimate, Saturday afternoon on a rollcall vote on which there was no vote against the bill. It took a lot of hard work by staff and by the committee members behind the scenes on a bipartisan basis to get it done. Doing it that way, of course, we don't cause the controversy that makes us news, but we do get things done in this committee, and the chairman is very proud to be a part of the committee and its chairman when we are able to do things in that way.

So, I thank every member of the committee and every member of our staff who did the hard spade work that made it possible.

Now, Mr. Thomas, we would be glad to hear from you.

STATEMENT OF LEE M. THOMAS, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, ACCOMPANIED BY RICHARD K. WILLARD, ACTING ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION, DEPARTMENT OF JUSTICE; LINDA FISHER, EXECUTIVE ASSISTANT TO THE ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY; HENRY HABICHT, ASSISTANT ATTORNEY GENERAL, LANDS AND NATURAL RESOURCES DIVISION, DEPARTMENT OF JUSTICE; MIKE ROLLISON, COUNSEL FOR TAX POLICY, DEPARTMENT OF THE TREASURY; AND LINDA CARLISLE, TAX POLICY DIVISION, DEPARTMENT OF THE TREASURY

Mr. THOMAS. Thank you, Mr. Chairman.

Let me introduce the other people with me at the table this morning. In order to be as responsive as possible to the questions of the committee, I thought it would be advisable if other representatives of the administration with particular interest and expertise in areas associated with Superfund joined me.

On my far right is the Acting Assistant Attorney General for the Civil Division, Rich Willard. Next to me is Ms. Linda Fisher, who is my executive assistant and for the last year has chaired our Superfund reauthorization task group. Immediately on my left is Hank Habicht, who is Assistant Attorney General for the Lands and Natural Resources Division. Next to him is Mike Rollison, who is Counsel for Tax Policy at the Department of Treasury. Next to him is Linda Carlisle, who is also with the Department of Treasury in the Tax Policy Division.

Mr. Chairman, I have a written statement which I have provided to the committee. I would like, however, to summarize and highlight that statement in my opening comments.

Senator STAFFORD. That would be agreeable to the committee. The committee, if there is no objection, would place your entire statement in the record.

Mr. THOMAS. Thank you, sir.

The process that we have used for making recommendations concerning reauthorization of Superfund is consistent with a process that I discussed with this committee last year on several occasions, as you indicated. We began a review of the experience we had had

with implementation of the current authorities with Superfund, both within EPA as well as within the other executive branch agencies and State agencies that have been responsible for carrying that program out.

Additionally, as you know, we completed a number of studies which had been called for in the original statute and provided those to Congress. Finally, we went through an extensive process of reviewing recommended proposals with other executive branch agencies. Finally, there was a series of recommendations which I made to the President and Vice President in a lengthy session with them several weeks ago.

The end result of that process is the proposal, which you most graciously introduced, that the President submitted both to the Senate and to the House last week. It is that proposal I would like to walk through with you today. In that regard, I hope to clear up issues that you have. For instance, each of the issues that Senator Durenberger mentioned, I think, involves a different reading of the law than we have.

So, with that, let me talk about the administration's bill.

First, it triples the response resources available for dealing with this massive problem in this country. It proposes \$5.3 billion in tax revenue that would be available for implementing this program. Additionally, it proposes an expanded enforcement program that we project would avail us of about \$2 billion in private party clean-up during that same 5-year period of time, for a total cleanup effort under the Superfund Program of approximately \$7.5 billion.

Second, it makes a series of proposals for focusing the program on hazardous substance sites. I will talk to each of these points in some detail. This one, particularly, I think, is more prospective than it is retrospective if you look back at the sites we have dealt with to date, particularly those on the National Priority List. I will explain to you that those proposals largely leave intact our ability to deal with those sites. So, it is looking ahead and trying to ensure that our focus is on hazardous substance sites.

Third, it expands our emergency cleanup authority. This is a particularly relevant section of the bill, we feel, in that we think that has been a very effective part of the program, particularly the aggressive way we have used it in the last couple of years. I will talk about that in a little more detail later.

It promotes permanent cleanup solutions. One of the things that we have found, particularly over the last 2 years as we have worked not only with this program but the difficulties of the RCRA Program, we would like to have more specificity in the law promoting permanent cleanup solutions for guidance to us in selecting remedies.

It establishes benchmark cleanup standards. We think it is important that in the statute standards and the process be established. We have incorporated into our proposal the policy which we adopted in our national contingency plan revision, which is basically the how-clean-is-clean issue, incorporating benchmark standards and specificity in the statute on that.

Next, it guarantees community involvement in our decisions about our policy. We have involved the community in that decision-making process by a policy that I established about 18 months ago.

We have incorporated into the statute specific language that would guarantee that kind of participation.

Finally, it ensures an adequate, stable, and fair financial base. I will get into detail with the Treasury Department in discussing that financing proposal with you.

Before I get into the specifics, let me just bring you up to date quickly on where we are in dealing with the hazardous waste problem.

These two graphs in each category show where we were December 31, 1984, and where we will be at the end of this fiscal year. First, with our inventory of sites, how many sites are in that inventory that we need to assess. This work is largely done by the States and our regional offices.

We have almost 20,000 sites. We are continuing to update that inventory at a much slower pace than when we established it, but we are continuing to get sites incorporated into that inventory.

From the inventory, we move for a site assessment. We actually began that site assessment process much more aggressively last year than in the past because we had a grant authority enacted by you in our appropriation bill so that we could have the States much more fully involved in site assessment. By the end of this year, we project we will have assessed over 16,000 sites, that is, a review of the site to determine in fact whether it is a site that warrants field investigation.

To date, we have completed over 4,000 of those field investigations with another 1,000 to go this year. Most of those field investigations are done by our field investigation teams out of each of our 10 regional offices. They include an on-site assessment, samples analysis, and a determination of the extent of the problem at the site.

As you know, we respond with one of two authorities, either our emergency authority if there is a threat or a potential threat to human health or the environment, or our long-term authority if we place the site on the National Priority List. We currently have 786 sites, both final and proposed, on our national priority list, and we project that list may grow to as high as 2,000 sites.

Now, let's look specifically at where we are with site activity, again using the same dates, where we were at January 1, where we project we will be at the end of this fiscal year. Emergency cleanups, part of our program that we are moving, we think, very aggressively, are running at nearly 200 a year. That is individual sites. It was about 460 January 1, and we are looking for almost 650 by the end of this fiscal year. By the way, we make proposals—later on I will discuss them with you—for expanding our cleanup authority there.

Second, then, our big sites, the large sites that are on the national priority list—where do we stand with moving forward with those? The first phase, as you know, is our detailed engineering studies; it generally takes 18 months to 2 years to fully define the full extent of the program at the site and fully define how we are going to clean it up. By the end of this year, we are projecting that nearly 500 priority sites will have those engineering studies either underway or completed.

We will be in the construction phase, which means we have finished the design of the remedy and have actually begun construction, at a projected 163 sites. The construction will either be finished, will be in monitoring, or will be in the construction phase.

So, the total number of sites, hazardous waste sites, where we actually had activity, either the emergency program or the remedial long-term program, was 753 sites at January 1. By the end of this year, we project 1,073 sites with site activity either completed or underway.

Now, specifically, the National Priority List, the 786 sites we are working hard to increase: We have our update process that goes on periodically. As a matter of fact, it will probably be more frequently this year than in the past in that one of the things you asked us to do, very appropriately, when you passed the first law, was to fully inventory the extent of the problem and determine whether there is an emergency situation or whether it is a long-term chronic situation.

As you can see, the engineering studies, the first phase, are moving up rapidly; we are showing 448 by the end of the year. The reason the other chart showed more engineering studies is we actually have taken detailed engineering action at a number of sites that are not on that National Priority List. Many of them were in the early phases of the program.

Emergency cleanups: We do those both at sites on the National Priority List and sites that are not on the National Priority List. Most of the emergency cleanups at sites on this list are site stabilizations where we have gone in and have stabilized the site until the detailed work is done, largely on subsurface contamination.

On construction, again, as you can see, we will have 126 at the end of this year.

Obviously, you have a pipeline effect in this kind of cleanup program. You will see construction going up fairly rapidly as the engineering study phase is completed on many of those projects.

Now, let's talk about the proposal we have made for the next 5 years in the administration's bill. First, the response program, the part that Senator Durenberger mentioned which is basically focused on hazardous substance releases. First, we would suggest that the focus should be on just that—abandoned sites, uncontrolled sites, municipal or industrial sites with problems, RCRA sites where we have insolvent companies, or any spills or releases of hazardous substances.

Second, we have a safety valve. That is, even where we have specific exclusions, we suggest that if there is not an ability to move under another authority, the President should have the authority to trigger the Superfund Program. Let me talk to you a little bit, before I move to the next issue, about some of the specific things we are suggesting.

For instance, we are suggesting that mining sites that could be covered under the Surface Mining Reclamation Act not be covered under Superfund. If they can't be covered under that, then they would be eligible under Superfund. If there were a major public health or environmental emergency, and for whatever reasons the Surface Mining Reclamation Act was not available, then the President could use the Superfund Program.

Second, where there is a lawful application of pesticides registered under the FIFRA and we have a problem, we are suggesting that should not be eligible for funding under Superfund. We have a major effort underway now, both on the prevention side as far as our FIFRA Program is concerned and our Pesticide Registration Program, and a review of the extent of the problem in this regard. Under our current national priority list, there are six sites in Hawaii that would be excluded by this suggestion. Those are the only 6 that would be excluded and, as a matter of fact, under all of our proposals, those are the only 6 that would be excluded from the 786 we are dealing with.

Next, we are suggesting not that you have to have defined the source of contamination before you can initiate action, but that where the source in fact is shown not to come from a traditional treatment, storage, deposition, transportation of a hazardous substance, a broad definition of a hazardous substance, then it would not be eligible under Superfund. Buildings, businesses, domestic wells—specifically, we are trying to deal with the issue of asbestos in schools as not eligible for funding under the Superfund Program.

Those specific items are a narrow exclusion. It is not the New Brighton, not the California underground storage tank release. Any of those we propose would be eligible for funding. As I indicated, as we went back and looked at the full review of sites that we have dealt with on our national priority list, the six under our proposals that stand out that would not be eligible would be the Hawaii pesticide sites. All the others would be eligible.

Finally, we make a proposal that if there is a naturally occurring substance that causes a problem, it would not be eligible for funding under the Superfund Program. A specific example would be an outcropping or a high concentration of uranium ore in one particular area that was causing problems for residents in an area. We are suggesting that it is a natural occurrence, natural phenomenon. We would not respond to that kind of situation under the Superfund authority.

What we have tried to do, Senator, with this scope issue is in fact narrowly define exclusions, as I indicated, and not, in fact, draw very sharply down the number of sites that you have seen us deal with under Superfund to this point. It is a very difficult section to try to draft, but we think it is an extremely important section for the Congress to come to grips with.

We are getting more and more inquiries, more and more suggestions, that the breadth of the law as it currently exists makes Superfund an eligible source of funding for a wide, broad array of public works projects, all kinds of water system improvement projects, all kinds of individual home and housing projects. We are suggesting this a very important provision. We feel we have worked long and hard to draft it narrowly but so that, prospectively, we can ensure that our focus and our funding is on those major problems of hazardous wastesites and hazardous substance releases which we think is the primary intent of the Superfund Program.

The second major provision of our proposal is our enforcement proposal. We, Senator, feel that the enforcement program that we have had to date has been a very aggressive program, and we

would like to see it expand. There are some portions of the existing law that we would like to see modified.

Let me make clear that when we look at enforcement, we see both cost recovery in the 107 litigation route, and we also see cost avoidance, and by that I mean where we have taken an action either through court or through our administrative authorities to compel responsible parties to clean up or to pay for a cleanup before we have expended Superfund money. In fact, that is where the largest volume of our enforcement work pays off in terms of money.

For instance, last year we entered into settlements, either consent decrees or consent orders, with responsible parties for approximately \$150 million in cleanup at Superfund sites. When I project a \$2 billion cleanup effort over the next 5 years, that is the area in which I am projecting that figure—our strong enforcement programs pays dividends in responsible parties actually cleaning up.

We also will have a strong cost recovery program. Money received from cost recovery in no way reflects the kind of enforcement program we have in place.

We respect to specific provisions, First, retaining the strict joint and several liability provisions that we have received from court decisions on the existing law—We don't think clarification of that is required because we think it is both strict and joint and several, and we think that is appropriate as a foundation for our strong enforcement program.

Second, tougher civil and criminal penalties, civil penalties of \$10,000 a day and \$25,000 for criminal penalties, a few modifications such as on reporting of releases, incorporating an administrative penalty in addition to the criminal penalties.

Third, additional administrative order authority, particularly under 104 where, without the finding of an imminent and substantial endangerment required under section 106, we actually can use 104 to enter into an agreement with responsible parties to take action at a site.

Stronger access and information gathering authorities are particularly important when we are trying to obtain information on the full extent of the problem and full extent of the liability.

Next, no pre-enforcement review of selected cleanup actions. This has become a particularly troubling issue of late as we have gone in and used our order authority to compel action at a site. We specify the process that would be used, the opportunity that would be available for responsible parties both to claim and review their liability issues as well as the appropriateness of our cleanup remedy consistent with the National Contingency Plan. We specify that that would be in the 107 action. We also specify that our record of decision, where we make our decision, would be on the record as an administrative process.

So, we have tried to draft a proposal that clearly defines how we will deal with review of our orders once issued, insuring that responsible parties have the opportunity at the proper time to review both the issue of liability as well as the issue of appropriateness of cleanup.

Finally, we deal in the statute with the issue of right of contribution and contribution protection. We have embodied in the statute specific language that talks about right of contribution and contribution protection. It incorporates basically the position that we have taken in our judicial consent decrees and in our consent orders. However, as opposed to having to negotiate that each time on a case by case basis, by incorporating it in the statute we think it will move the process forward more expeditiously.

Each of those provisions, we think, is significantly important to moving a more aggressive enforcement posture under the program.

Through the the third major category of our proposals, we will expand State responsibilities. First, by asking them to take our additional responsibility for managing the cleanups by promoting multisite cooperation agreements. That is a specific provision that we are recommending in the law that makes it clear that we can enter into a broad cooperative agreement with States to manage many of the cleanups at the sites on an annual basis.

Second, we suggest eliminating the preemption language on how the States raise taxes. Many of the States, as you know, have initiated similar tax provisions to the national tax provision to raise the money required for their match for operation and maintenance expenses. We would suggest that the current preemption that prohibits certain State taxing provisions be eliminated to give them more flexibility.

Third, we would suggest including State enforcement costs as eligible. That is the overhead cost that States incur when they take the enforcement action against responsible parties. We would like to provide that funding.

Along with that additional responsibility and funding, we would like the States to pick up additional responsibility and accountability, first, by increasing the State matching share. It is currently 90 percent Federal and 10 percent State on the cleanup portion, actually the construction portion. We are suggesting moving that to 80/20, but you have to bear in mind, we are suggesting expanding our emergency cleanup program, which is 100 percent Federal. We are suggesting it continue to be 100 percent Federal with a site assessment and investigation, 100 percent Federal for the site engineering, and 100 percent Federal for the site design. So, it is only at the cleanup construction portion of the remedial project we are now suggesting that the State pick up additional match.

Second, we suggest increasing the State match for sites operated by States. We have clearly defined that if a site was operated by State or local government, instead of a 50 percent match, it should be a 75 percent match. We think clearly you have here a State or local governments that was a responsible party if they operated the site. We feel that at a maximum, the Federal Government should not provide more than 25 percent of the cleanup cost out of the Fund if that site is to be cleaned up by that responsible party, State or local government.

Finally, we have a requirement which is similar to the provision suggested by Senator Chafee that this committee adopted last year that has to do with waste disposal and the role of States. It is a stringent requirement, but it suggests that States immediately get directly involved in trying to come to grips with what to do with

the waste from these Superfund sites. We would suggest 2 years in which the States would develop a disposal plan. That disposal plan could be for disposal within the State or through a compact of States. We would suggest at the end of that 2 years, if a State has not done that, they would no longer be eligible for Superfunding for sites in their State, except for emergency situations where water supply or temporary housing is required.

Finally, we would also suggest that if a State's option is for movement of the waste outside the State boundary, the State would pay the difference in transportation costs beyond the State boundary for the disposal of that waste.

Now, the revenue provision of the bill, one that we worked long and hard on last year and again this year, that the Treasury Department was particularly involved in with us. We had a number of issues we were looking at and a number of options we considered before we came up with the specific proposals that are in our proposed legislation.

The feedstock tax, we feel, has been a stable source of revenue. That could not have been predicted, I don't think, when this tax was first passed by Congress with any certainty, but I think in fact it has turned out to be a stable source of revenue, the current tax accruing approximately \$300 million a year. We did find two major issues when we began to look very closely at the feedstock tax and how it could be expanded, either in rate or in substance.

Those two major issues are first that, with much pushing, there are economic dislocations and economic disincentives that come to bear fairly quickly with those feedstocks and with the industry that generates them. Second, we also feel there is a major equity problem as far as the feedstock tax is concerned. If you look at the total amount of feedstock tax, it is from a relatively narrow industry. If you also look at the specifics of who is paying that tax, you will find that approximately 10 or 12 firms are paying approximately 75 to 80 percent of the tax money.

So, the two issues we ran into on expanding the feedstock tax were, one, equity as far as tax policy is concerned, and second, economic concerns associated with the particular industry if that tax were increased. So we have recommended continuing the feedstock tax on the current substances and at the current level without expansion.

The second tax option we have proposed, after looking at a number of others, is a waste end tax. The waste end tax has programmatic advantages. It broadens the base of the group that would be taxed. We think it is a more equitable tax. It also has a much more direct relation between the kind of program we have, which is a hazardous waste cleanup program, and the industries that are in fact being taxed, which are the firms that are storing, treating, or disposing of hazardous waste.

It will programmatically do two things. It will force, we think, a review of waste reduction practices and waste reprocessing practices in industries that generate hazardous waste. We think it also will compliment very well the RCRA regulatory program which you enacted last year aimed at banning waste from land in that we propose a two-tiered taxing structure for the waste end tax—a higher tax for the traditional, less desirable forms of waste disposal

such as land fills, land treatment units, surface impoundments, and a lower tax on all other types of disposal, specifically treatment, underground injection, and others.

We have proposed, over time, that those tax rates be modified each year as we take into account both changes in how much waste is disposed in each fashion as a result of implementing the RCRA program and changes in the volume of waste. We have projected, we think, a realistic amount of revenue from that waste. We have taken a conservative view of how much waste we think would fall into this category. We feel it will broaden the base, it will minimize adverse economic impact, and will ensure a stable source of revenue.

In that regard, we have incorporated into the proposal an administrative procedure for modifying the rates depending upon the revenue that is received so that if, in fact, our conservative assumptions are not conservative enough and the revenue is not available that we predicted, we would have the authority to borrow against anticipated revenue and modify the rates to recoup the amount of revenue which we would have needed in order to fund at the rate we have projected each year, which ranges from about \$550 million from this tax up to about \$650 million by the end of the 5-year period of time.

With those proposals, what have we then bought as far as clean-up is concerned over the next 5 years? As you can see, I have incorporated here a figure for 1982, 1985, and 1990 for both our emergency cleanup program and our long-term construction program.

First, let me say that as far as site assessment, site identification, that part that has to do with how many sites there are, we are anticipating that the vast majority of that work will be completed in the next 2 years. So, I don't have that incorporated here.

I have, however, incorporated where we are really going to be out there working on these sites. In 1982 we had moved out at 100 emergency cleanup sites. This year, as I indicated, we would be at nearly 650 sites. By the end of the next 5 years, there are almost 1,800 sites where we would have been out, we would have taken cleanup action, completed work at that site, or stabilized that site.

Under long-term remedial action, nearly 1,500 sites would have had the engineering study either completed or underway. Finally, in our construction program, as you can see, there is a dramatic increase from 163 this year up to 920 of the long-term construction projects that either would have been completed or would be underway at the end of this 5-year period of time.

We think it is an aggressive program. We think it is a program that is much larger than the program we have been operating for the last several years. We think that it balances the two things we were looking to when we looked at how big we thought this program ought to be: What is the problem, and how fast do we need to move to deal with it? We think that not only includes the size of the program but the mix of the authorities you have within the program.

For instance, we felt we needed additional authority under our Emergency Removal Program so that no site that we identify that presents a potential or a real threat to public health or the envi-

ronment has to wait. We can move out on it immediately. Our Emergency Removal Program gives us that authority.

Second, we balance how much we think we can manage realistically as far as this program is concerned without running into major problems of loss of effectiveness and loss of efficiency. We balance those two things and we think we have a responsive and a responsible program which we have presented to you today.

I would be pleased now, Mr. Chairman, to answer, along with my colleagues, questions that you and members of the committee may have.

Senator STAFFORD. Thank you very much, Mr. Thomas, for a very lucid explanation of the administration's bill and the program that you see coming up in the next few years.

To my colleagues I would suggest that, if there is no objection, on the first round of questions, we limit ourselves to 10 minutes each. I have conferred with Senator Bentsen. He is agreeable to that procedure. So, hearing no objection, we will limit ourselves to 10 minutes on the first round.

The Chair would again remind members that Mr. Thomas will be here with us again on Thursday and Friday and that any action we might take tomorrow in the course of our meeting will leave Mr. Thomas free to comment on it as he might wish on Thursday and Friday.

The Chair would finally note that any members who were not here as we began and who have opening statements, we would be glad to place that in the record or members can utilize part of their 10 minutes to deliver it, as they might wish.

Having said all that, Mr. Thomas, I note the administration's bill proposes no changes to existing law relating to a standard of joint and several liability. You said in remarks to staff on Friday, I am advised, that this issue was explicitly considered during development of the administration's bill, and you explained the reasoning behind the decision to leave existing law in place with regard to this particular issue.

Mr. THOMAS. Mr. Chairman, we feel that over the last 5 years, strict joint and several liability has been a major underlying component of the administration's enforcement of the Superfund statute. We think the court decisions which have been rendered concerning that have supported the administration's position. We think that the current law and the current court decisions provide us with the strength to continue with that good enforcement program.

Hank Habicht from the Justice Department may want to elaborate on that.

Senator STAFFORD. Well, I would gather that a change might further complicate your efforts in view of court decisions and the 5-year history of succeeding under this concept.

Mr. THOMAS. We feel that it might, in fact, launch us on another round of issues in the courts to get new readings on exactly what our standard of liability or scope of liability may be.

Senator STAFFORD. All right. Is there any further answer?

Mr. HABICHT. I might just add, Mr. Chairman, that we are certainly prepared to address this issue more fully should the members have interest in that direction. As Lee Thomas indicated, a

fundamental premise of the administration's approach is to provide a program that has an optimal mix of public and private resources brought to bear against the problem as well as having a program that moves forward at the least possible cost as quickly as possible.

An enforcement scheme is a critical component of the Superfund Program, as Lee indicated. Our experience has been to have an enforcement scheme that is effective and that minimizes unnecessary and highly contentious and complex litigation. This sort of scheme is extremely helpful in making that work. Joint and several liability is not a concept that anyone should support lightly in any context. It raises significant issues, but our experience has been that, to have an enforcement component, so that this is not just a massive Public Works Program, you need to have enforcement tools that make enforcement possible.

Senator STAFFORD. Thank you.

Mr. Thomas, last year you testified that a 5-year extension of the program at current levels would cost about \$5.2 billion. Last year's estimate did not take into account increased costs due either to general inflation or construction inflation. As I understand it, you are now estimating the adoption of S. 494 would cost about \$5.3 billion over the 5 years.

First, does your cost estimate for S. 494 take inflation into account, and, second, if the committees chooses to not adopt some of your proposed changes, such as increasing the State share to 20 percent and narrowing the scope of the program, will we have to adjust your estimate of \$5.3 billion accordingly?

Mr. THOMAS. Senator, it does not incorporate a general inflation factor for succeeding years. We have looked at that and we did not incorporate that. We don't think that would increase it much.

We have incorporated what we feel is a good figure for site cost based on the experience we have had over the last several years. We don't think that would be modified over time. We looked at that very hard.

If you did not incorporate some of the suggestions that we have made, such as the State share in operation and maintenance expenses, or if you did not increase funding, you, in fact, would merely decrease the number of sites we would work on. In other words, we would have less funding available to move on certain projects. It would not be a very high figure as far as numbers of projects, but it would be some.

Senator STAFFORD. The administration bill, S. 494, proposes a substantial narrowing of the scope of the program which we established in 1980. In that context, could you please provide us with four or five examples of each of the five areas where you propose to prohibit the administration from responding? In each instance, I would like to know how much money was expended by the fund and why you consider fund response to be inappropriate.

Before you answer that, and you might prefer to do it in writing, let me propound one other question. Several of the proposed exclusions are justified on the ground that there are regulatory programs which operate in those areas. For each of these laws, please provide the exact language which would enable you or the other responsible Government agency to, first, provide an alternative water supply; second, relocate families in communities, third, pro-

vide diagnostic assistance; and fourth, recover the cost of these actions. I would like not section numbers but the exact language and any judicial precedents supporting the administration view that these laws contain response, compensation, and liability provisions.

If you would prefer, I would accept the response in writing, since I have asked you several questions instead of just one.

Mr. THOMAS. Senator, we will work to provide that in writing. Let me say in general, though, as we took a look at our current national priority list to see how many of the sites out of the 786 we would not respond to under this series of proposals, I have identified the 6 pesticide sites, which actually form 1 site, in Hawaii as those that would be specifically excluded. I have not identified any others that would be specifically excluded.

As I indicated, I think the narrowing of the scope, as we have suggested, is looking more toward the kind of inquiries we are beginning to receive for dealing with sites under the Superfund Program in the future. Our suggestion is that the kind of projects we have dealt with are the kind that should be dealt with under Superfund, that we shouldn't begin to get into a large array of sites beyond that. That is where our narrowing is directed.

However, I will work to provide you with those specific answers which you asked for.

[The information requested follows:]

Background on SMCRA Funding
Availability for Abandoned Mineland Reclamations

- SMCRA tax on currently operating coal mines.
- Revenues vary from year to year depending on appropriations and tax collections. Over the past three years, funding available for Abandoned Mineland Reclamation grants has been:

FY83 \$173 million
FY84 \$263 million
FY85 \$257.7 million

- There are 16 mining sites on the Final NPL and Update 2 in nine States as follows:

State	NPL Sites	Uncontrolled Reclamation Funds Remaining in FY'85
NM	2	\$3,270,280
OK	1	\$2,006,696 (no construction grants can be awarded now because of restrictions on the State regulatory program)
KA	1	\$206,657
CO	4	\$2,966,393
SD	1	-0- (SD is not a SMCRA program State - no contributing coal mines)
AZ	1	-0- (not a program State)
CA	3	-0- (not a program State)
UT	2	\$2,400,840
WA	1	-0- (Some active coal mining, but State does not have an approved regulatory program)

- Each participating State submits a plan with priority sites for action. Some States (not many) have included non-coal sites on their priority lists.

Examples of Release Categories
Excluded from Response Under Proposed 101(b)(2)(A-E)

The President shall not respond to a release or threat of a release:

101(b)(2)(A)

Resulting from the extraction, beneficiation, or processing of ores and minerals which are covered under the Surface Mine Control and Reclamation Act of 1977;

- Narrow interpretation of SMCRA coverage
Palanuik and Frank Mines, South Dakota

(B) resulting from the lawful application of a pesticide product registered under Section 3, permitted under section 5, or exempted under section 18 of the Federal Insecticide, Fungicide, and Rodenticide Act;

- Waipahu Wells, Hawaii
- Waiawa Shaft, Hawaii
- Mililani Wells, Hawaii
- Kunia Wells I, Hawaii
- Kunia Wells II, Hawaii
- Waipio Heights Wells II, Hawaii

(C) to the extent it affects residential dwellings, business or community structures, or public or private domestic water supply wells, unless the release or threatened release emanates from a vessel or facility used for the deposition, storage, processing, treatment, transportation, or disposal of hazardous substances;

- Asbestos in schools, churches, buildings and homes
- Pentachlorophenol treated homes
- Lead paint chipping off homes

(D) of a naturally occurring substance in its unaltered form, or altered solely through naturally occurring processes or phenomena, from a location where it is naturally found;

- Kingman Airport Industrial Area

(E) covered by and in compliance with a permit, as that term is defined in section 101(10), if such hazardous substance was specifically identified, reviewed, and made part of the public record in issuing the permit and the permit was designed to limit such substance.

- hypothetical example

EXAMPLES OF SITES THAT WOULD BE EXCLUDED UNDER THE
PROPOSED AMENDMENTS AND COVERED BY SMCRA

Examples of mining sites that would be excluded by the proposed amendments to CERCLA due to response under SMCRA would include the Palanuik and Frank Mines (ND Uraniferous Lignite Mines) in southwestern North Dakota. Coal deposits at these mines are associated with low-grade uranium deposits, and due to mining operations radioactive elements have been discharged into surface waters. Funding for response actions under SMCRA is anticipated. [Note: these sites have been scored using the HRS. The scores were provided to the House Oversight and Investigations Subcommittee.]

National Priorities List Site

Hazardous waste site listed under the
Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) ("Superfund")

WAIPAHU WELLS

County of Honolulu, Island of Oahu, Hawaii

The Waipahu Wells Site consists of four drinking water wells that are owned and operated by the City and County of Honolulu. The wells are located on the Ewa Plain in the County of Honolulu, Island of Oahu, Hawaii. They are contaminated with ethylene dibromide (EDB) and trichloropropane (TCP), according to analyses conducted by the Hawaii Department of Health and other government agencies. The Waipahu Wells are part of a distribution system which serves 13,700 people in Waipahu, Ewa, and Waianae.

There are several well sites with similar contamination problems located in the Schofield Plateau/Ewa Plain area of Oahu. The City and County of Honolulu Board of Water Supply has conducted pilot tests on methods for decontaminating the water in the area and has had success in removing dibromochloropropane and TCP with granulated activated carbon and with aeration towers. However, because of continuing contamination, the people served by the Waipahu Wells are being provided with an alternative supply of drinking water.

National Priorities List Site

Hazardous waste site listed under the
Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA("Superfund"))

WAIAWA SHAFT

County of Honolulu, Island of Oahu, Hawaii

The Waiawa Shaft is located on the Ewa Plain in the County of Honolulu, Island of Oahu, Hawaii, and is owned and operated by the U.S. Navy. The well is part of a closed distribution system which provides drinking water to 64,000 people in the area of McGrew Point, Pearl Harbor, and part of Hickam Air Force Base. The well is contaminated with dibromochloropropane (DBCP) and trichloropropane (TCP), according to analyses conducted by the U.S. Navy and other government agencies.

There are several well sites with similar contamination problems located in the Schofield Plateau/Ewa Plain area of Oahu. The City and County of Honolulu Board of Water Supply has conducted pilot tests on methods for decontaminating the water in the area and has had success in removing DBCP and TCP with granulated activated carbon and with aeration towers. The Navy is currently reviewing alternative treatment methods for DBCP removal in a study designed to complement the Brand of Water Supply effort.

National Priorities List Site

Hazardous waste site listed under the
Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) ("Superfund")

MILILANI WELLS

County of Honolulu, Island of Oahu, Hawaii

The Mililani Wells Site consists of six drinking water wells that are owned and operated by the City and County of Honolulu. The wells are located in on the lower Schofield Plateau in the County of Honolulu, Island of Oahu, Hawaii. They are contaminated with dibromochloropropane (DBCP) and trichloropropane (TCP), according to tests conducted by the Hawaii Department of Health and other government agencies. Three of the wells are presently not being used. The Mililani wells normally supply water to 19,500 people through a closed distribution system.

There are several well sites with similar contamination problems located in the Schofield Plateau/Ewa Plain area of Oahu. The City and County of Honolulu Board of Water Supply has conducted pilot tests on methods for decontaminating the water in the area and has had success in removing DBCP and TCP with granulated activated carbon and with aeration towers.

National Priorities List Site

Hazardous waste site listed under the
Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) ("Superfund")

KUNIA WELLS I

County of Honolulu, Island of Oahu, Hawaii

The Kunia Wells I Site consists of four drinking water wells that are owned and operated by the City and County of Honolulu. The wells are located on the Schofield Plateau in the County of Honolulu, Island of Oahu, Hawaii. They are contaminated with trichloropropane (TCP), according to analyses conducted by the Hawaii Department of Health and other government agencies. The Kunia Wells I are part of a distribution system which serves 21,000 people.

There are several well sites with similar contamination problems located in the Schofield Plateau/Ewa Plain area of Oahu. The City and County of Honolulu Board of Water Supply has conducted pilot tests on methods for decontaminating the water in the area and has had success in removing dibromochloropropane and TCP with granulated activated carbon and with aeration towers.

National Priorities List Site

Hazardous waste site listed under the
Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) ("Superfund")

MILILANI WELLS

County of Honolulu, Island of Oahu, Hawaii

The Mililani Wells Site consists of six drinking water wells that are owned and operated by the City and County of Honolulu. The wells are located in on the lower Schofield Plateau in the County of Honolulu, Island of Oahu, Hawaii. They are contaminated with dibromochloropropane (DBCP) and trichloropropane (TCP), according to tests conducted by the Hawaii Department of Health and other government agencies. Three of the wells are presently not being used. The Mililani wells normally supply water to 19,500 people through a closed distribution system.

There are several well sites with similar contamination problems located in the Schofield Plateau/Ewa Plain area of Oahu. The City and County of Honolulu Board of Water Supply has conducted pilot tests on methods for decontaminating the water in the area and has had success in removing DBCP and TCP with granulated activated carbon and with aeration towers.

National Priorities List Site

Hazardous waste site listed under the
Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) ("Superfund")

KUNIA WELLS I

County of Honolulu, Island of Oahu, Hawaii

The Kunia Wells I Site consists of four drinking water wells that are owned and operated by the City and County of Honolulu. The wells are located on the Schofield Plateau in the County of Honolulu, Island of Oahu, Hawaii. They are contaminated with trichloropropane (TCP), according to analyses conducted by the Hawaii Department of Health and other government agencies. The Kunia Wells I are part of a distribution system which serves 21,000 people.

There are several well sites with similar contamination problems located in the Schofield Plateau/Ewa Plain area of Oahu. The City and County of Honolulu Board of Water Supply has conducted pilot tests on methods for decontaminating the water in the area and has had success in removing dibromochloropropane and TCP with granulated activated carbon and with aeration towers.

National Priorities List Site

Hazardous waste site listed under the
Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)("Superfund")

KUNIA WELLS II

County of Honolulu, Island of Oahu, Hawaii

The Kunia Wells II Site consists of two drinking water wells that are owned and operated by the City and County of Honolulu. The wells are located on the Schofield Plateau in the County of Honolulu, Island of Oahu, Hawaii. They are contaminated with dibromochloropropane (DBCP) and trichloropropane (TCP), according to analyses conducted by the Hawaii Department of Health and other government agencies. They have been closed since July 1983. The wells are part of the Kunia distribution system that provides drinking water to about 13,700 people.

There are several well sites with similar contamination problems located in the Schofield Plateau/Ewa Plain area of Oahu. The City and County of Honolulu Board of Water Supply has conducted pilot tests on methods for decontaminating the water in the area and has had success in removing DBCP and TCP with granulated activated carbon and with aeration towers.

National Priorities List Site

Hazardous waste site listed under the
Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) ("Superfund")

WAIPIO HEIGHTS WELLS II

County of Honolulu, Island of Oahu, Hawaii

The Waipio Heights Wells II Site consists of two drinking water wells that are owned and operated by the City and County of Honolulu. The wells are located in Waipio on the lower Schofield Plateau in the County of Honolulu, Island of Oahu, Hawaii. One well is contaminated with trichloropropane (TCP), according to analyses conducted by the Hawaii Department of Health and other government agencies. The other well has been shut down for repairs and has not been tested for contamination. The wells are part of a distribution system which serves 3,400 people in the Waipio Heights area.

There are several well sites with similar contamination problems located in the Schofield Plateau/Ewa Plain area of Oahu. The City and County of Honolulu Board of Water Supply has conducted pilot tests on methods for decontaminating the water in the area and has had success in removing dibromochloropropane and TCP with granulated activated carbon and with aeration towers.

Examples of excluded categories of problems 101 (b)(2)(C) - structures

• Pentachlorophenol Treated Homes

There are apparently some sites involving log houses that have been treated with pentachlorophenol (penta or PCP), a wood preservative. Two examples are the Fowler residence in Madisonville, Kentucky and the Loehr residence and others in Evansville, Indiana. CDC reviewed analytical results of wood/soil samples from Fowler residence and determined that penta levels do not pose an "undue level of concern". CDC recently took blood samples of Loehr family members to verify penta concentrations of 3400 ppb reported by the family's medical doctor. Awaiting results of the sampling.

Other problems include structures constructed with asbestos, soil contamination from lead based wood chips that have fallen from individual homes, and contamination of homes from radioactive substances brought to the homes.

There are no other listed sites of this nature.

National Priorities List Site**AZ Arizona**

Hazardous waste site listed under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA "Superfund")

KINGMAN AIRPORT INDUSTRIAL AREA
Kingman, Arizona

Conditions at listing (December 1982): The Kingman Airport Industrial Area encompasses about 6 square miles northeast of Kingman in Mohave County, Arizona. The valley is semiarid with no permanent surface water. The area depends on ground water for all domestic, municipal, industrial, and agricultural purposes. All wells drilled to date into the Airport Basin, the aquifer supplying drinking water to 20,000 people in Kingman, contain hexavalent chromium. Five wells have chromium levels that have exceeded the maximum level set by EPA for chromium in drinking water.

Status (June 1984): EPA deferred rulemaking on this site in September 1983 to allow more time for resolving issues related to its inclusion on the NPL. In its review of the Kingman Airport Industrial Area, EPA determined that the chromium occurs naturally in ground water and is probably not related to any industrial or other human activity. EPA believes that CERCLA is not intended to correct undesirable natural conditions. Therefore, the Kingman site is not included on the NPL at this time.

**EXAMPLES OF FEDERALLY PERMITTED RELEASES
THAT WOULD BE EXCLUDED BY AMENDMENTS**

At the present time EPA has not identified any examples of Federally permitted releases on the National Priorities List that would be excluded by the proposed amendments to CERCLA. A hypothetical example of such a release would be a surface water discharge of toxic substances allowable under NPDES permit issued under the Clean Water Act where those substances were specifically addressed in the permit and the discharges are fully in compliance with the permit. Another hypothetical example would include a plume of ground water contaminants from a hazardous waste management facility permitted under the Resource Conservation and Recovery Act where the permit had specified allowable alternate concentration limits in ground water for those contaminants.

Senator STAFFORD. All right. Section 104 of S. 51 establishes cleanup standards. In a briefing on the Agency's proposed changes to the national contingency plan, your staff said that the EPA proposal was essentially the same as what we have included in S. 51. A moment ago you appeared to say that the cleanup language of your bill, S. 494, also reflected the proposal made in the national contingency plan. Frankly, I prefer the language of S. 51 as much as anything else because the committee approved it last year and your proposal may be new.

Are you wed to your language in this or other areas?

Mr. Thomas. Senator, today I am wed to the language in our proposal in this and in other areas.

Senator STAFFORD. We will see if, in a week, we can have a divorce then. Or, at least a separation.

Mr. Thomas. This particular section does incorporate the final policy which we promulgated about a month ago in our national contingency plan revision. I will say that, as we discussed last year, this was a very difficult set of language to develop, in policy as well as statute. We worked through this over a period of over a year, I would say, within the Agency. We think this is a good way to proceed with how clean is clean issues.

Senator STAFFORD. All right, thank you very much.

The Chair wants his colleagues to realize he has confined himself to the 10 minutes and is timing Senators.

Senator Bentsen?

Senator BENTSEN. Thank you very much, Mr. Chairman.

Mr. Thomas, in talking about the through-put tax, I notice that you referred to it, and others did, as a stable source. I think that has been true up to now. Certainly, it is the easiest one to apply, and that is one of the reasons it was utilized.

One of the things I note is that these big international companies tend to pay a lot more attention to the bottom line than the flag under which they serve. Some of them have made deals with the Saudis and others through the Middle East. When you try to determine whether they are crying wolf or it is really happening to them, I note that almost every one of them is laying off employees in this country.

I don't want to tilt it over from an economic standpoint where they just emphasize their operations offshore and close them down here. That is why I think it is important that we broaden this base. I am pleased to see your start in that direction.

It is going to be much more difficult to assess the end use tax than to fully anticipate it, I think. But the question of stability in the through-put tax is one that will be moot, because if they move offshore, you no longer have a stable source.

What I want is a bill passed through this committee that passes Finance and passes the floor. I want one that works and accomplishes what has to be done in cleaning up these sites, a substantially expanded program and one that is funded, because if it isn't funded, down it goes.

In the practicalities of it, one of them that has been brought to my attention is the question of the availability of insurance. People in the industry have come to me and, I am sure, to the other members of this committee over the last few days talking about the dif-

ficulty of the implementation of the Superfund and the hazardous waste regulatory programs that results from a drastically shrunk-en market availability of liability insurance that is hardly available to anyone manufacturing or disposing of hazardous substances. That is going to make it very difficult to meet the financial responsibility requirements of Superfund. If it is unavailable to the contractors, it may soon interfere with the pace of that program.

I would like to ask you, when they tell me that the Jackson Township decision effectively overruling the so-called environmental impairment exclusion in general liability policies, where do we go from there? What do we do to try to see that such insurance or protection is available so we can get this work done in cleaning up these sites? Do you have some suggestions in that regard?

Mr. THOMAS. Senator, almost similar to the comments that were made earlier, the insurance issue that has arisen during the last number of months is one that we also have become very concerned about, and we are trying to analyze its full scope in order to determine what kind of provisions may be necessary, both in this statute or as well in policy, both in our RCRA program and in this Superfund program. As you recall, last year and again this year, we have made proposals concerning liability of contractors who are doing work on Superfund sites.

However, the issue that has been raised of late is far broader than that issue, I think. We have begun to work with the insurance industry itself to try to fully determine exactly what the scope of the problem is and what some alternatives may be.

Today, I regret I don't have an answer as to either of those, how extensive a problem we have or what some alternatives may be. I would hope we would have that over the next several weeks as we try to work on this issue.

Senator BENTSEN. Let me further state that I, in no way, want to see the progress of this bill impeded at these hearings, but I will ask for the chairman to let us have some hearings after it has passed this committee and allow those people to testify and you to testify in that regard, if you will, and see if we can come up with some solutions so that we don't impede the progress of cleaning up these sites.

Mr. THOMAS. I think that would be excellent. We would like to participate with you on that.

Senator BENTSEN. Now, your bill would repeal the postclosure liability fund which absorbs the current postclosure tax into the general waste end tax. We passed that to give some assurance to those communities that were accepting hazardous waste management facilities. If they were assured that the funds would be there to cover cleanup costs and any third party damages, that they be there in perpetuity, perhaps they would be more ready to accept a well-run permitted facility in their midst.

If you take away that one key element of assurance, and assuming the Superfund is not going to be here forever when these facilities might later be causing problems, and according to the Treasury study, private insurance isn't available, what can you tell those communities to guarantee their long-term protection?

Mr. THOMAS. Senator, we found that the postclosure fund was actually a very, very narrow fund as far as which facilities may in fact be covered under it, and the ones that were probably most in jeopardy over the next number of years of not having the resources to clean up a problem would never have been covered by it. Additionally, the facilities that would have more than likely had the funds would be the ones that would have been covered by the fund. It almost ran contrary to our overall responsible party authorities and enforcement authorities under Superfund to, in fact, say now we will pick those up under some separate fund.

Our suggestion is that if, in fact, we have RCRA facilities that over a period of time after they close present a problem, the liability associated with taking care of that problem should be taken care of by the responsible parties. As you know, we have financial responsibility requirements under RCRA to ensure that that happens. That is a far broader category. As a matter of fact, that is the total category of hazardous waste operators as opposed to a very narrow category.

Senator BENTSEN. Mr. Chairman, you alluded to the problems, in your opening statement, of requiring liability insurance so we could pursue the cleanup of these sites. In no way do I want to impede these hearings or slow down the passage of this bill, but this problem has arisen, and it seems to be a very serious one. I would strongly urge you that, after we have completed the passage of this bill from this committee, at the earliest opportunity that we have some hearings where these people are allowed to address it and see what we can do to come up with something, and that Mr. Thomas be there, to see what we can do to address this problem.

Senator STAFFORD. Well, Senator Bentsen, I would be glad to accept that suggestion. I had an opportunity to talk with spokesmen for the insurance industry last week. At that time, at least, they said they had a problem but they didn't know what the solution might be. I told them that if they thought they could arrive at some proposal we should hear, we would make the time available to hear it. So, without slowing down this bill, at some subsequent time, if the industry has a proposal, we would be glad to hear it and hold hearings.

Senator BENTSEN. Good.

Mr. Thomas, last year the EPA supported cost recovery under section 107 for the cost of response to releases of pollutants and contaminants. This year, the Agency is proposing to eliminate any authority to respond to releases of pollutants or contaminants.

In how many cases of short-term removal actions and longer term remedial actions has the Agency responded to pollutants or contaminants rather than hazardous substances?

Mr. THOMAS. Senator, I don't believe we have responded to any sites under the pollutant or contaminant category. I believe they have all been categorized as hazardous substances. The suggestion we were making last year had to do with clearing up the legal issue of whether, if we responded, we could recover our cost.

As you indicated, this year we have proposed eliminating pollutant and contaminant as a category for response so, obviously, the cost recovery provision would not be required. I don't believe,

during the last 5 years, we have responded in that category to situations where we did not have a hazardous substance.

Senator BENTSEN. Mr. Thomas, I understand my time is about expired.

Senator STAFFORD. Thank you, Senator Bentsen.

Senator MITCHELL.

Senator MITCHELL. Thank you, Mr. Chairman.

Mr. Thomas, in response to a question by Senator Stafford, you indicated that the \$5.3 billion figure contains no adjustment for inflation. Is that correct?

Mr. THOMAS. That is correct.

Senator MITCHELL. You are here representing the administration's position, are you not?

Mr. THOMAS. Yes, sir.

Senator MITCHELL. Are you aware of the administration's projections in the President's budget recently submitted to Congress regarding inflation?

Mr. THOMAS. Related to Superfund?

Senator MITCHELL. No, related to inflation generally.

Mr. THOMAS. No, sir.

Senator MITCHELL. Well, the President's budget projects that over the 5-year period, inflation will average just under 4 percent. I can't understand how, on the one hand, the administration projects that inflation will occur at a rate of about 4 percent or just slightly under it and, on the other hand, come in and say we don't think that with respect to this program inflation is a factor. I understand what your answer is.

Second, does your figure include any adjustment for increases in the average cost of cleanup per site?

Mr. THOMAS. Senator, it doesn't, and as you know, we have adjusted that several times over the last 2 years. We feel that that proposal we have in the current average cost per site is the one that now, given more experience, is the one that we think will hold.

Senator MITCHELL. Of course, the same answer was given in each of the previous 2 years, and in each case, however, the figure increased. Just for the record, they ought to be stated. In 1981, the average cleanup cost per site was \$2.5 million. In 1983, it was \$4.5 million. In 1984, it was \$6.5 million. In 1985, it was \$8.1 million. And in each of the previous 2 years, the response made by either you or someone in your place was the same thing, "Well, we have now reached the learning curve, and this is it." Let's hope you have, but I think you can understand some concern on our part.

Finally, does your projected \$5.3 billion figure include any funds for the payment of natural resource damage claims now authorized by law with respect to which States have filed approximately \$2.7 billion worth of claims against the fund?

Mr. THOMAS. No, it does not, Senator. One of the proposals we have made in this legislation is to eliminate natural resource damage claims as an eligible item for fund reimbursement—not the assessment of damages, nor the enforcement of damage reimbursement from responsible parties, nor damage restoration as a part of a response action, but as a separate claim against the fund

for damages or restoration. We have suggested it not be eligible and therefore have not incorporated it.

Senator MITCHELL. So, if you say that you need \$5.3 billion over 5 years to do the job, and you make these assumptions, if any or all of these assumptions prove to be incorrect and there is in fact some level of inflation in America over the next 5 years, or there is in fact an increase in the average cost of cleanup per site, or Congress refuses to accept your recommendation on natural resource damage claims and you are forced to pay them, then the \$5.3 billion figure would be inadequate. Isn't that correct?

Mr. THOMAS. Senator, you would adjust the number of projects you would be working on.

Senator THOMAS. I beg your pardon?

Mr. THOMAS. You would adjust the number of projects you would work on. You either increase the money or you decrease the projects.

Senator MITCHELL. Right. In other words, you would clean up fewer sites.

Mr. THOMAS. That is right.

Senator MITCHELL. Actually, if the assumptions were off far enough, and we don't know what the line is in the continuum, but you could actually be operating at a pace slower than the current pace, could you not?

Mr. THOMAS. Well, if we take into account—if we make an assumption that we would start paying natural resource damage claims at the rate they came in last year, we may clean up no sites.

Senator MITCHELL. I would like to go to another area now, Mr. Thomas, and that is the area in which, as you know, I have had an interest and we have talked many times before, and that is the provision for compensating persons injured through exposure to hazardous substances, the so-called victim compensation.

When we discussed Superfund last year, as you recall, you stressed very heavily and, I thought, with considerable force and persuasion, that we ought to wait until we got the study that the original law had called upon EPA to produce before acting on the legislation. Indeed, several members of the committee who opposed acting last year did that.

My question to you is, did you review that report in connection with your recommendations or lack of recommendations regarding victim compensation?

Mr. THOMAS. Yes, sir, Senator. As your recall, that report also was made available during some of our discussions last year. I am going to ask Rick Willard, if I could, from the Justice Department, to participate with me in responding to questions on this. As you recall from last year, this is an issue that the Justice Department has taken a lead on for the administration. We have participated in it actively, but I think Rich probably could respond to that as well.

Senator MITCHELL. Well, I would like, then if I could post the question, I would like to refer specifically to that report which was prepared by the EPA, was it not? You are familiar with that report.

Mr. THOMAS. You are talking about a 301 study, Senator, specifically relating to—

Senator MITCHELL. Yes.

Mr. THOMAS. Yes.

Senator MITCHELL. As I look at this report, and it is difficult for someone like myself with no technical background to understand, it contains several exhibits and a lot of data regarding 25 substances most frequently reported as present at the 546 national priority sites. It then goes on to describe some of those substances in what I found to be a manner which raises deep concern.

If I could just summarize briefly, I know time is short. Maybe we could get into this in a second round of questioning, but it says, "As can be seen in the exhibit, most of these substances present serious hazards to humans and animal life, depending on the concentration counted and the duration of exposure. In summary, 7 of the 25 substances,"—and I repeat, these are the 25 substances most commonly found at the existing sites—"are very toxic to aquatic life. Nearly half of the substances are known or probable human carcinogens and, thus, theoretically, pose finite risk even at the smallest concentrations. Nine of the 25 are known to be mutagens. Seven of the 25 are known triatogens. Seven of the 25 will ignite at room temperature," and so on it goes.

I would like to ask whether you do not feel some concern for the lack of a victim compensation provision in the bill that you have and whether or not you agree there is a need for this, given the information contained in the report, which the EPA has provided?

Mr. THOMAS. Senator, let me comment and then I will ask Rich to comment. We may also want to have Dr. Houck who is here from the Centers for Disease Control as well.

We do not feel that a victims' compensation component should be a part of the Superfund statute. Obviously, it is not a part of the proposal we made.

There is no question that many of the substances we deal with at Superfund sites are bad actors with respect to mutagenicity or carcinogenicity. The major issue has to do with whether there is any cause or effect relationship between those substances at sites and individuals who may live near those sites. We do not think, in this case, that there is that kind of cause and effect relationship that should be dealt with in an administrative process. We think that if there is a direct cause and effect relationship that there is a legal remedy available.

As a result, we have not proposed an administrative scheme related to victims' compensation specifically for Superfund.

Beyond that, Rich, you may want to comment.

Mr. WILLARD. There are, of course, a number of compensation programs or entitlement programs which the Federal Government provides that provide benefits to people who receive injuries or illness that may be attributable to exposure to hazardous substances, including Medicare, Medicaid, Social Security disability insurance, as well as, of course, worker compensation programs for people who have occupational exposure. So, there is already a fairly large system which provides entitlements and social programs to benefit people who suffer illnesses or inability to work.

In addition to that, there is an existing tort system under State law that provides compensation where people can establish the legal requirements for that compensation. We do not see the need to create a new kind of administrative entitlement program to pro-

vide additional levels of benefits as part of the Superfund reauthorization.

Senator MITCHELL. Well, I will have several comments to make on that in further questions in the next round, but my time is up now.

Senator STAFFORD. Thank you, Senator Mitchell.

Senator Durenberger?

Senator DURENBERGER. Thank you.

Lee, let me go back to my original question and your response to it. It relates, on pages 2 and 3 of the bill, starting with subsection 2 under b, and it is actually subsection c of subsection 2 on page 3 I am referencing: "The President shall not respond under this Act to a release, or threat of a release, to the extent it affects residential dwellings, business or community structures, or public or private domestic water supplies unless the release or threatened release emanates from a vessel or facility used for the deposition, storage, processing, treatment, transportation, or disposal" et cetera.

I guess I need you to take just a minute or so to clarify that just a little bit more. I gave you the example of New Brighton not only because I am familiar with it but I think it would illustrate, for purposes of your response, just exactly what that section means. The TCE contamination, obviously, can come from a whole variety of sources. In so many cases, that includes septic tanks where it is used as a cleaning agent. I guess there is a more appropriate name, but that is what it is used for.

I am curious to know whether under the language of this bill if septic tank contamination would be eligible for fund response. Would the people in New Brighton need to prove that it was the U.S. Army and not its own septic tanks that caused the problem? How would that be handled?

Mr. THOMAS. Senator, as we drafted this, and this is certainly a category where your staff might work with ours on how the language could be cleared up, our intent was specifically not to include New Brighton as an example. In other words, with respect to the issue of having to, before responding, try to prove that there is a connection between one of these kinds of facilities or vessels and the substance you are dealing with, the cause and effect relationship, our intent was that you would not have to prove that cause and effect relationship before you would respond.

Our intent here was to have a fairly narrow exclusion that would deal with things of the type, as a specific example, of asbestos in a school building, not the kind of thing that would be like a California underground storage tank release where we haven't been able to pinpoint any particular tanks, or we haven't been able to pinpoint exactly which source is the source that we think is responsible. It was not to exclude those things.

We would be pleased to work with you on that, Senator. It was difficult as we tried to draft these exclusions not to exclude large number of sites we have been dealing with and that you are familiar with. We had specific examples. It was very difficult to craft language that excluded certain things and not others, but if we can work with you to more clearly define that, we would be glad to.

Senator DURENBERGER. Let me ask you what happens to the sites you are concerned about which you investigate and rank but which

don't reach 28.5 on your hazard ranking system. Do you have any kind of a statistical summary on the state of those sites?

Mr. THOMAS. No, I don't, Senator. I am sure we could probably provide you with information on the fate of those sites. They could either be responded to by private parties, by State or local, or by our emergency authority. I am sure you will find that there is probably an array of responses that is going on to a number of those sites.

Senator DURENBERGER. Then let me ask you to comment on the petroleum exclusion under Superfund, now that we have the leaking underground storage tank regulations underway. Do you have any sense for the gap that might exist between the Regulatory Program and the Superfund Cleanup Program?

Mr. THOMAS. We really don't, Senator. I think it will probably be another 18 months or so before we will get a much better feel for whether there is a gap or how much it may be as we get into the regulatory program with the underground storage tanks. As you know, you have incorporated responsible party corrective action there under the underground storage tank program, which we think is the way to go. We don't have any better information today than we had last year. I think in another year and a half we will have much better information, or 2 years, as we implement that regulatory program.

Senator DURENBERGER. Finally, let me ask you about the cost recovery, and George mentioned the 301 study. I wonder if it is convenient for you to go year by year and give me some projection of the fund expenditures you expect to recover through enforcement. The 301 study says the 1984 amount, for example, of recovery was \$6 million. I am curious to know if it ever gets much larger than that.

Mr. THOMAS. It does, Senator. The cost recovery part, which is the section 107 actions that we take after we have completed clean-up, have been much slower to accrue revenue to the fund than was predicted, for instance, 4 years ago when Congress enacted this program for a couple of reasons. One is that we generally take those actions after we have completed cleanup.

We have underway now about \$150 million in 107 cost recovery actions that have either been filed with Justice or referred to Justice. I think we are seeing 2 pretty hefty pipelines as we look to the future as to the kind of recovery that will accrue to the fund from that. Our projections run from \$32 million in fiscal year 1986, next year, up to \$190 million in 1990 as far as that kind of cost recovery.

In addition to a slow start, you also find that the harder you push on your 106-type Enforcement Program, the less you can anticipate getting on your actual cost recovery under 107, because you have taken your best cases from an enforcement point of view and you have reached settlements, as opposed to having to expend the fund. Additionally, you find that the 107 cases in fact will generally receive fairly extensive litigation in that the site has already been cleaned up. In fact, you have your toughest case as far as the Government is concerned and, often, a case that will go through court over a period of however long that may take. So it does take a while, but it is a part of the program that we are strongly com-

mitted to. We do, in fact, think that pipeline will begin to pay dividends, as you can see from our projections.

Senator DURENBERGER. Thank you very much, Lee.

Thank you, Mr. Chairman.

Senator STAFFORD. Thank you, Senator Durenberger.

Senator BAUCUS?

Senator BAUCUS. Thank you, Mr. Chairman.

Mr. Thomas, first I would like to tell you that I have some of the same concerns that Senator Bentsen raised with respect to insurance liability. I know you discussed all this and I know the chairman did too. I encourage you to look at that, as well.

The first question I have for you revolves around scope and definition of what is included and what is not included, particularly under title I in the administration's bill. I understand that the President "shall not respond to release"—and this is the language now from title I—"resulting from the extraction, benefaction, or processing of ores and minerals, including phosphate rock and overburden from the mining of uranium ore which are covered under the Surface Mining Control and Reclamation Act of 1977."

I am asking, now, does that mean that waste tailings and the smelter sites would be excluded? The language says including "resulting from extraction, benefaction, or processing of ores and materials."

Mr. THOMAS. If they are covered under that act, they would be excluded under this act. Now, the two ways they would be included is if there were a situation where they were not included under SMCRA or if there were a public health or environmental emergency and, for whatever reason, even though they were covered under that act, resources were not available to respond. Then the President could use Superfund.

Senator BAUCUS. Frankly, it is confusing drafting, because that paragraph sandwiches in I think uranium ore to phosphate which is not included under the Surface Mining Control Act, as I understand it. I am asking these questions because the whole paragraph is very confusing.

Mr. THOMAS. I think that might be an earlier draft, Senator. Is that actually in the bill?

Senator BAUCUS. As I have it, it is.

Mr. THOMAS. The copy I have—

Senator BAUCUS. I will read you the language.

Mr. THOMAS. The intent there had to do with the SMCRA Act, Senator, and it was just to exclude those things that could be covered under that act.

Senator BAUCUS. OK, well—

Mr. THOMAS. I think as we went through the drafting we actually picked up on that problem you have noted and deleted those.

Senator BAUCUS. OK, I have the most recent draft now, and your most recent draft says: "resulting from the extraction, benefaction, or processing of ores and minerals which are covered under the Surface Mining Control and Reclamation Act of 1977."

Mr. THOMAS. Right.

Senator BAUCUS. So, you saying that if extraction, et cetera, is covered under the Surface Mining Control Act, that then they are excluded from this.

Mr. THOMAS. That is correct.

Senator BAUCUS. But if they are not covered under that legislation, then they could be included.

Mr. THOMAS. That is correct.

Senator BAUCUS. OK.

My second question goes to the natural resource damage claim portion. As I understand it, in July you recommended that that provision of Superfund be budgeted at \$63 million. Is that correct?

Mr. THOMAS. In the original proposals we were talking about for the coming year, we did, I think, use an estimate of \$63 million. I think that was the total amount that—at any rate, it was \$63 million. You are correct. At one point in time, we were proposing that.

Senator BAUCUS. Last July, you recommended \$63 million, why are you recommending zero in this bill?

Mr. THOMAS. We are proposing that that portion of fund eligibility be excluded from Superfund. It has to do with the amount of money that we think is available for response, the problem we think that is out there that needs to be dealt with as far as response is concerned. We don't feel that that should be an eligible item.

Senator BAUCUS. Why, though?

Mr. THOMAS. Just simply because of the matter of priorities, Senator, of what we think has to be dealt with in the country in cleaning up these sites. We do deal with natural resource damages as we respond in cleaning up ground water aquifers or cleaning up contaminated soil or restoring a site, but when it comes down to priorities, we feel that has to be a higher priority now than paying a lot of money out of the fund for damages that may or may not have been caused by a site. It is a matter of priorities.

Senator BAUCUS. Well, a lot of this I think comes down to proximate cause, if you will, because I know in Montana, for example, I think you know the situation I am referring to is where a dam is erected across a river. It is a fork of the Columbia, and there is an arsenic problem there. The dam has contaminated the ground water which is available for a well very close to the dam, a well that is used to supply the water for the town there.

The trouble is that the arsenic comes from at least 100 miles upstream. It comes from tailings which are 100 miles upstream and is also from a smelter which is close by. It is clear that the arsenic problem which has contaminated the ground water and the well there is caused, as I said, by a site at least 100 miles upstream.

It seems to me that if Superfund is designed to clean up sites and for emergency responses, and so forth, that this is a clean case. My concern is that there may be other cases like this around the country. I am curious why, then, we can't have natural resource damage provisions to accommodate these kinds of problems.

Mr. THOMAS. In a situation like that, we are certainly proposing that we respond to the problem as far as public health or environmental risk is concerned. What we are suggesting is that natural resource damages, damages that may have resulted to the fauna or general ecology of the area, not be eligible for reimbursement out of the fund. As an example, Senator, last year I received \$2 billion in requests from the fund for natural resource damages. None of that related to cleaning up a site or responding to a health threat

at a site or an environmental threat at the site. What it related to was damages to nature.

I am not downplaying damages to nature. I am just suggesting that as far as priority is concerned and use of the money, we have to respond to and clean up the sites that we have all talked about so often before we start using that fund for providing damage reimbursements. It would have nothing to do in that case, however, with our ability to deal with that well, to deal with cleaning up any part of that site around that well.

Senator BAUCUS. So, you are saying that if the damage is only to nature, then it shouldn't be compensable, but if the damage is to people, in some way it should be. Is that true?

Mr. THOMAS. Well, I am saying when we establish our priorities that we should focus on restoration of that site. If restoration means we restore the natural damages at that site, then we will do that. If it is to restore that site so that it no longer presents a threat or a potential threat either to the environment or to the public health, then we should do that. But if it says to go the next step, which is to reimburse for damages that may have occurred, and if you look at the broad array of damage claims I have received, it is very difficult for me to say that we should begin to use the fund to reimburse a broad array of damage claims. We have the kind of problem and the kind of issues in this country under the restoration program and response program that I think are important to put at the top of the list.

Senator BAUCUS. I asked you a while ago how far along you were going to be in issuing the regulations. How far along are you now?

Mr. THOMAS. I am hoping to have them issued this week, Senator.

Senator BAUCUS. OK. Thank you very much.

Senator STAFFORD. Thank you, Senator Baucus.

Mr. Thomas, you have said that the existence of a scheme of strict joint and several liability at that Federal level not only makes it easier for you to recover your costs but provides a substantial incentive for responsible parties to act voluntarily. I gather, though, from statements which you and other administration people have made that you do not favor a Federal cause of action for individual citizens. I simply wonder at the apparent fact that you favor a Federal cause of action for the Government but not for individual citizens, and if there is some comment you might have on that.

Mr. WILLARD. As you know, Mr. Chairman, I appeared before you last summer to testify on the proposed Federal cause of action and thereafter, the Department of Justice did submit its views on the proposal that you introduced as part of S. 2892 in which I noticed you have announced an intention to introduce as an amendment. Basically, the reason for the difference of the treatment is that we think that the importance of eliminating an ongoing hazard of engaging in the kind of cleanup that the Administrator has been testifying about justifies bringing out the most extraordinary kind of legal tools and remedies so as to eliminate all possible obstacles to getting the job done and getting it done fast. Those include a number of doctrines that the law has not seen fit to impose for normal tort recovery programs. We think it would be an unwar-

ranted expansion of those kinds of tools to use those for the establishment of liability under a Federal cause of action.

In addition, as you are aware, Mr. Chairman, we had a number of other concerns about the proposed Federal cause of action, as well.

Senator STAFFORD. Thank you very much. I dare say that Marvin Belli would be disappointed in your answer.

All right. Thank you. That completes the questions I have. Senator Mitchell?

Senator MITCHELL. Thank you, Mr. Chairman.

Mr. Willard, in response to my last question on victim compensation, you said that you didn't think it was necessary because there were all these other programs. You cited Medicare, Medicaid, Social Security disability, among other things.

Are you aware that the victim compensation program proposed by me and considered by this committee which Mr. Thomas already testified against by definition applied only to persons who had no eligibility under some other program?

Mr. WILLARD. Senator, I have seen a staff draft of the latest version of your proposed amendment, and I saw the version that was included in S. 2892 last year. The draft I saw does indicate that there is a nonduplication of benefits provision covering insurance benefits that may be provided, but it was not clear from the draft I saw whether or not that would also extend to such benefits as Social Security, VA, Medicare, workers comp, and so forth.

Senator MITCHELL. So, if we change it to add those, will you support the bill then?

Mr. WILLARD. No, Senator, we will not, but it—

Senator MITCHELL. So, really, then, the reason that you advance is not a reason for opposing the bill because you wouldn't support it even if we accommodated that opposition.

Mr. WILLARD. The point I was trying to make was that this proposal would provide a more generous level of benefits to persons eligible for benefits under this program than is currently available for other people who suffer diseases, injuries, or misfortunes under broad-based Government programs.

Senator MITCHELL. We won't debate now the eligibility question under Social Security disability or Medicare or Medicaid—they are limited to persons who fall into certain categories. The legislation we are proposing does not intend to duplicate that but make coverage available where it doesn't now exist.

I think it is somewhat misleading for the administration to continuously come in here and raise arguments such as you have done when, in fact, that is not the reason for your opposition. If I change that bill, if I ask you to draft it in a way that made it nonduplicative of any Government program you still would oppose the bill. Suppose we made the level of benefits no higher than the lowest level of benefits under any of these programs. Would you then support it?

Mr. WILLARD. Senator, what you are saying, though, is that it would have eligibility standards under which people would be eligible for benefits under this program who would not be eligible in light of the eligibility limits set up under Social Security, Medicare,

or Medicaid. That is, it would pay benefits to people who have a higher income than permitted to qualify for Medicaid. What that does is it erodes the limitations that Congress has set on these entitlement programs and creates a large obligation for the Government, money that is going to have to be paid from some source or another.

Senator MITCHELL. The demonstration program is limited in dollar terms, as you well know, and the argument about the large amount remains to be seen. We don't know that.

We do know that individual families have a very, very difficult time under these cases. They are not eligible for other programs. It is facetious to say Social Security disability when you are talking about young children with leukemia, and you are arguing about the State court system.

You are familiar, I am sure, as a lawyer, with the study and report that was made to the Congress regarding the State court tort system of recovery which concludes that although there are, theoretically, methods of legal recourse available, as a practical matter they are simply not available. There are numerous obstacles for these individual families recovering under the State court tort system. They are at an impossible disadvantage in proceeding under those avenues.

I just find it very, very discouraging to hear the administration's repeated opposition with these sort of make-weight arguments when every time an argument is made I say, well, all right, if we accommodate that argument, will you support the bill, and the answer is no. It demonstrates very clearly the insincerity of the arguments in opposition to the program.

I want to conclude on this point by just making one further point here from this study that you yourself prepared. We have had Dr. Houck here several times, and part of your opposition to this has been the difficulty of establishing cause and effect. I have acknowledged that. In fact, I believe that to be a very strong argument in favor of such a program, because if the U.S. Government, with all the resources, all the knowledge, all the skill that it can marshal to deal with a problem like this can't establish cause and effect, what possible chance does some family of working people, such as those we have had before this committee time and time again, which the chairman, and the other members of the committee, will recall who suddenly find their children contracting leukemia and dying, have? How can they possibly establish cause and effect if you can't do it, Dr. Houck can't do it?

Yet, you come back and say they have the State court tort system. Let me just read you from your own report one paragraph about the difficulty of this task. This is after describing in some detail the adverse effects of the 25 substances found most frequently at the sites that have been assessed. These are places and neighborhoods where Americans live and where they are exposed to this.

After describing the tremendous potential adverse effects of each of the 25, it concludes with this paragraph:

It should be remembered that the specific chemicals reported do not fully describe the range of substances found at NPL sites, because the typical waste site contains an unclassifiable combination of mixtures. Some materials will have entered the sites in an amorphous state by virtue of the complex manufacturing process from

which the wastes emerge. Other unusual materials may form in situ at the site when industrial wastes cross-react or are transformed by microorganisms into new compounds. Scientific knowledge about the health effects of these more unusual chemicals is fragmentary. Even more important with regard to waste sites, however, is the paucity of scientific information about the hazards of mixtures of individual substances even when the health threats of each compound singly are known. Very little is known about the cumulative effects of exposure to subthreshold concentrations of each of a variety of toxins. In particular, we are relatively ignorant of the possible synergistic effects of combinations of substances wherein chemical or biological interactions make the hazard of the mixture greater than the sum of the individual hazards.

The Government writes that report, and then the Government comes in and says, well, let these citizens who are harmed go into private court and prove cause and effect when their children die.

I just have one final question, Mr. Chairman, on an unrelated matter.

Mr. WILLARD. May I respond, Senator?

Senator MITCHELL. Yes, sure, go ahead.

Mr. WILLARD. One of the points you make was that the proposed demonstration program would be for a limited amount of money, \$30 million per year for an initial 5 to 10 sites to be designated. However, the standards for eligibility under the program, once fully implemented, would be much more costly. For example, the Black Lung Program was originally supposed to cost \$40 million a year, about the same amount of money, and is now costing about \$2 billion a year.

We have heard earlier today from Senator Domenici and from Senator Bentsen about the difficulty of raising the taxes to fund the proposed Superfund expansion at its \$5.3 billion level much less if there is tacked onto that an enormous entitlement program to provide medical benefits and lost income benefits to people who may be associated with toxic exposure. So, what we see is a very expensive entitlement program being created from this small demonstrated program that would place great pressure on the financial resources that, as you have already noted, are now under great pressure.

Senator MITCHELL. Well, help us draft tighter laws, then, instead of throwing up obstacle after obstacle and, after each one is disposed of, throwing up a new obstacle. What bothers me is the absolute total insincerity of the arguments that are being made. It is not as though you recognize there is a problem and you want to try to work together to solve it. It is as though you are trying to deny there is a problem and just throw up one road block after another. If you think that the eligibility requirements are not strict enough, then suggest some language to make them more strict.

Finally, I would say that the very purpose of a demonstration program is to permit us to gather empirical data on the scope of the problem, the amount that the claims would be, and how to deal with them. I have heard widely varying views on whether it is going to be another Black Lung Program as you have suggested, and all the administration witnesses use that example. Others have suggested it is far less broad than is believed. I hope the latter is true.

But we are never going to know. We are never going to know until we try to deal with what is a very real problem for thousands

of American families. The attitude that the administration takes is simply one obstacle after another. I find it very, very disheartening and discouraging.

I have other questions, but I will wait for another turn.

[The following letter supplements Mr. Willard's statement on the victim compensation issue:]

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AND INTERGOVERNMENTAL AFFAIRS,
Washington, DC.

Hon. ROBERT STAFFORD,
Chairman, Committee on Environment and Public Works, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: At the Committee's February 25 hearing on the reauthorization of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), Acting Assistant Attorney General Richard K. Willard explained the Administration's position on the victim compensation amendment proposed by Senator George Mitchell. This letter supplements Mr. Willard's statement on this issue.

By way of overview, it is our basic position that the five-year \$150 million victim compensation demonstration project proposed by Senator Mitchell would not long remain within the narrow bounds prescribed. This proposal would create a new entitlement program for the compensation of victims of injuries or diseases that potentially may be associated with exposure to any hazardous substance. If ultimately expanded nationwide, the cost of this entitlement program could vastly exceed the initial \$30 million per year authorized by the amendment.

There would seem to be little to be gained from the proposed demonstration project. While it is possible that the federal and state governments could administer such a limited project, any such project would create an unavoidable appearance of unfairness. While individuals in a few areas would receive substantial benefits from this demonstration project, individuals living in thousands of other areas and suffering from the same disease would receive nothing. This inevitably would lead to tremendous pressure on the Congress to expand the project to a nationwide basis. Such pressure would be increased by the fact that once compensation is provided to some people for injuries "not known to be unassociated with" exposure to particular hazardous substances, individuals at other sites will see this as an official finding of causation and demand similar benefits for similar exposures. Moreover, once the government accepts responsibility for providing medical and disability benefits for a certain group of individuals, it will be exceedingly difficult to terminate the benefits after the demonstration project expires.

As noted above, the standard contained in Senator Mitchell's amendment would permit an award of benefits if an illness or injury is "not known to be unassociated with" exposure to a hazardous substance. This is a totally open-ended standard, which would permit the award of benefits in countless cases where causation is doubtful or, in fact, nonexistent. Any causation requirement should be based on the traditional causation standard as it exists in tort law as well as in other administrative compensation systems that provide benefits for similar types of injuries or diseases, such as federal and state workers' compensation programs and the veterans' disability program. While such a causation standard would undoubtedly result in denial of benefits to some who believe that they have been injured as a result of exposure to hazardous substances, without such a standard the program would be grossly overinclusive, compensating many who have no legitimate claim.

Moreover, individuals harmed by exposure to hazardous substances have other avenues of recourse. State tort law, which has been rapidly evolving in the area of toxic tort in recent years, often can provide a remedy in hazardous substance cases. In addition, there is a full array of state and federal health and income maintenance programs, including social security, medicare, medicaid, veterans' disability benefits and workers' compensation, which currently provide benefits to those seriously injured. Yet, the Mitchell amendment would provide additional benefits to individuals suffering from certain diseases theoretically attributable to hazardous substances, while others with the same diseases would receive less.

The issue before the Committee, therefore, is not a simple, \$150 million demonstration project, but rather, whether CERCLA should be expanded with the addition of a multi-billion dollar entitlement program for individuals exposed to hazardous substances. While we have no firm cost estimates at this time, the class of potential beneficiaries should the project be expanded nationwide is likely to be in the mil-

lions. Past experience with similar compensation programs, particularly Black Lung, suggests that the ultimate cost of administrative compensation programs tends to be far higher than initial estimates. In the case of Black Lung, expenditures rose from a dollar estimate of several hundred million over the lifetime of the program, to approximately two billion a year.

As several senators noted at the hearing, the tax burden of financing CERCLA falls heavily on particular industries, and will most likely be increased in any reauthorization bill to meet the growing cleanup costs. To impose the added burden of an enormous victim compensation entitlement program could raise these tax rates to extraordinary levels, far in excess of CERCLA's current cost.

The Office of Management and Budget has advised us that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

PHILLIP D. BRADY,
Acting Assistant Attorney General.

Senator STAFFORD. Senator Baucus, do you wish more time?

Senator BAUCUS. I just have one followup question.

Senator STAFFORD. All right.

Senator BAUCUS. Mr. Thomas, we were talking about the Surface Mining Control Act. It is a very technical question, but I want to clear it up in case there is a problem here.

The language of the bill basically says that—let's see, that is title I, section 101(b)(2)(A)—“resulting from extraction, benefaction, or processing of ores or minerals which are covered under the Surface Mining Control and Reclamation Act.” As you know, that act regulates only coal, but that act also contemplates studies of other minerals.

My question is, does “covers” refer only to the regulation aspect of that act; namely, only coal, or does “cover” refer to studies also contemplated under that act? If “covered” refers to the regulation aspect only, then it is only coal, but if the word “cover” in your bill refers to the studies as well contemplated and provided for in that Act, we have a problem.

Mr. THOMAS. Senator, there are some specific provisions that that act could cover, reclamation beyond coal, beyond just study. There is a provision that the Governor could, if coal problems have been dealt with in the State, use the funds under the act for other problems from surface mining or for the surface conditions of underground mines. Additionally, there is an emergency provision in that act. However, our intent there was to deal with the very specific readings of that act. I think you are right. The majority of the act's purpose is coal, but there are a couple of provisions that allow it to go beyond coal. If the act was available to deal with that, then we would not deal with it under Superfund.

Senator BAUCUS. What are those two areas again?

Mr. THOMAS. One area has to do with the Governor's determination as to whether, in fact, the coal reclamation issue in the State has been dealt with satisfactorily and the funds would be available for other types of mining problems.

Senator BAUCUS. That is if a Governor terminated something? I don't understand. What action would the Governor take which would—

Mr. THOMAS. He would make a determination that they—

Senator BAUCUS. Oh, determination. I am sorry.

Mr. THOMAS. Determination, determination, that they had dealt with the coal reclamation problems in the State and the funds

would be available then to move on to other mining problems in that State.

Senator BAUCUS. But if the Governor so determines, then you are saying that your language would preclude the availability of Superfund funds.

Mr. THOMAS. That is correct.

Additionally, there is a second provision that talks about emergency restoration, reclamation, abatement, control, or prevention. We also think that also would fall under that.

Senator BAUCUS. You put the Governors in a pretty tough position, then. Out in Montana, the Governor had to divert some funds because there was an emergency in the State to provide for tailing problems in Montana. It seems to me there is a problem then. We also have coal problems in Montana, too.

Mr. THOMAS. Right.

Senator BAUCUS. But you have to deal with things on an emergency basis sometimes. Some are more urgent than some others, even though they are both very significant for causing potential damage.

Mr. THOMAS. Right. the intent of what we were trying to get to, Senator, is, in fact, not to have two programs trying to do the same thing. We saw the Surface Mining Act had actually been passed to deal with a series of problems. The intent of our proposal was a narrow drafting so that we would not deal with them under Superfund if they could be dealt with under SMCRA.

Senator BAUCUS. I appreciate your responses. You have helped clarify the administration's intent. I think that is something we are going to have to deal with as we work with the bill.

Thank you.

Senator STAFFORD. Thank you, Senator Baucus.

We note Senator Simpson has returned. Senator Simpson?

Senator SIMPSON. Thank you, Mr. Chairman. I am sorry I had to leave. I want to thank you for having these hearings. I hope we can consider the administration bill right along with the bill from this committee and, of course, consider anything else that we have before us. That is the way you have always done it in the past and I am sure we will do it this time, too.

But I think this is a first here. This is the first time we have had a measure of this scope brought before our committee by this administration. I have often said that I had hoped they would have done this with the Clean Air Act. If the administration had presented a measure, we would have had less trial and tribulation.

Now we have this measure before us. It is very helpful. I appreciate what you are trying to do, Lee Thomas, and I think that you are a professional and we need that. We have needed that during this administration, and we needed it in the last administration. I happened to be here during some of that.

We don't need political zealots; we need pros, and you are it. I hope that we can focus on fact and not emotion as we get into Superfund. I hope we can rid ourselves of suspicion as to what you might be up to in your hidden agenda. I hope we can be realistic and responsive and incorporate some of the administration bill into a markup vehicle. That will be what I will hope to do and hope that my colleagues might see fit to embrace some of that, and we

will find out as we present them, perhaps, in the form of amendments and win, lose, or draw, move on to see if we can't get a good bill.

Some of the things that concern me is how clean is clean when we are dealing with human health and the environment. You are never going to get to perfection. I deal with that often in nuclear issues. How safe is safe? I don't know, but you can reach the point of absurdity in all of those situations. I hope we try not to sap ourselves with zeal and high old drama as we deal with Superfund. It is not an election year now, and maybe we can settle down and try to do something thoughtful. I hope so.

I want to commend Senator Mitchell whom I have worked with, my staff is working with, as he is looking for some creative things in the area of victim compensation which is obviously going to be with us. I have had some very reluctant thoughts about that. Maybe we can work something out. We are working toward that pilot program on the State level; something in the way of funding on an annual basis rather than in an entitlement. Anyway, we are trying which is the way he does it and the way I try to do it, too.

Federal toxic tort, that is one that still escapes me, always will escape me, and it may not escape me when we vote on it, but eventually I will follow it around kind of like a hound of hell. We will see if we can't try to divorce that from our thought, because if we are ever going to get rid of causation when we see injury, then we have just distorted the entire tort system of tort law of decades in the United States. We do those things in the spirit of emotion and impatience, and impatience has wrought more goofy legislation in this place than perhaps any other thing, and we will learn that again perhaps as we deal with the farm bill this week.

So, we are not very good at that, and I am not either. I am not leaving me out. I respond to those things just like the rest of us, but I think that this is an important opportunity to deal with the real issue of Superfund. How do you take the stuff and clean it up? How do you get to the worst ones and clean them up, and spend money to do that, and make those who did it put up the money, either in a blend of feedstock or waste end or corporate finance, whatever? The Finance Committee is going to be considering some of those things. This is not our jurisdiction alone.

I just hope we can come up with something sound and not get diverted into recent tragedies around the earth that have appalled us all. I am pleased that you will be here during most of our markup activities. I think that is very important that you be here because I think at least on both sides of the aisle there is an element of trust in what you are trying to do. If you can't establish that, then we are all in trouble because then we will go back into the politics of it and I don't think we need that here.

I used up my 10 minutes, but I wanted to share those things. I like the idea of the scope. The scope of Superfund is the hazardous site and cleaning it up and getting it done. Sure, they are taking time to do, but if your timetable there is correct, you are going to make a significant impact during the rest of this administration, and I hope you are right there to do it.

I do have a question. How much time do I have, Mr. Chairman?

Senator STAFFORD. You have adequate time for a question, Senator.

Senator SIMPSON. One? I thought you were going to be generous and give me two.

Let me ask—I will double it up then. I heard one question this morning like that. It took 10 minutes to ask.

Senator STAFFORD. Well, you actually have about 4 minutes if you want to use it.

Senator SIMPSON. Four minutes, thank you.

Let me ask you on this area of contribution and joint and several liability. It will jumble in the course of capsuling this question. Could you explain why that approach was chosen over an approach that might allow apportionment as an alternative and maybe leaving joint and several liability as an alternative? Can you tell me how you got there?

Mr. THOMAS. Let me ask Hank Habicht from the Justice Department maybe to respond to that, Senator.

Mr. HABICHT. Thank you, Senator.

As I indicated earlier, joint and several liability is an extraordinary and a strong legal tool. The administration's approach to this tool is based on the fundamental premise that the best way to bring the private parties at these various sites together to do a lot of the work themselves is to place a great emphasis on enforcement, and particularly on settlements. This assumes that we are all in agreement that we need to move quickly on the most serious hazardous waste sites and focus on a quick, efficient, and effective response to those sites, and that is important to bring private resources to bear on the problem. In many cases, private parties can do the work more cheaply. Such work is not only an important adjunct to the program and one that we are counting on, but also one in which we have a great deal of confidence in moving ahead with these sites and getting the basic job of cleanup done.

Joint and several liability—the allocation of liability and the liability scheme—is not an easy question. I think you are absolutely right to bring it up as an important issue to focus on, in terms of who pays and in what form they pay. Our review of this issue, however, has shown that joint and several liability has been an effective tool, particularly because at many of these hazardous waste sites you are dealing with potentially hundreds of contributors where the evidence of exactly who contributed what is somewhat mixed. There are complex technical issues of what sort of chemicals are present there and how they move and so forth. It is a recipe for very costly and time consuming litigation and one which, if the Government were to be required to prove exactly how much someone contributed and what they contributed and how it moved for each individual defendant, would make litigation an extraordinarily costly and cumbersome process.

Senator SIMPSON. Well, now, this is the rest of the question then. On this question of transaction costs at sites, which is that lovely phrase which I guess refers to legal and other fees expended during the process, transaction costs, are we seeing the point that legal fees are greater than cleanup costs at some of those sites already? If that is so, is that a good use of our national resources, and what does it imply about the success of Superfund if that is happening?

Mr. HABICHT. Senator, I don't have the exact costs of the litigation. I think it is absolutely fair to say, and I feel strongly and I know it represents the administration's view, that litigation is not the most desirable way of resolving issues, but sometimes, to paraphrase Winston Churchill, it is better than the alternative, given the need to move quickly and the difficulty of coming to grips with who ought to pay.

I think, with regard to specific statistics, that we can and should pull those numbers together. The initial litigation has been——

Senator SIMPSON. I wish you would. If you would pull those numbers together, if you can show me where legal fees or transaction fees are greater than cleanup costs, then I would like to see those figures, because that is disturbing to me. It ought to go into things on the chart instead of my old profession. I think I would like to look at that.

I thank you, Mr. Chairman. I have some particular thoughts about your use of the miter model on hazardous waste ranking on mining sites which, I think, does not take into effect western mining and some things I think Senator Baucus discussed with you. They are some things that I am concerned with, too, and I thank you very much. I will submit those.

Thank you, Mr. Chairman.

[Responses to Senator Simpson's questions follow:]

1) The 301(a) Study produced by the EPA reports that approximately 30% of Superfund spending over the next decade will be aimed at "transaction costs" (legal and administrative expenses).

a) How did you arrive at your figures in that Study?

There appears to be some misunderstanding about the 30% of Superfund spending that in the question is called "transaction costs." These costs are not only legal and administrative costs. They include all the expenses other than payments to contractors and States for on-site removal and remedial response.

The figures cited in the CERCLA Section 301(a)(1)(C) study ("Extent of the Hazardous Release Problem and Future Funding Needs") were calculated through use of EPA's Superfund Budget Forecasting and Financial Flows models. A more accurate title for the section of the Forecasting model entitled Administration and Enforcement would be Administration, Enforcement, and Program Support. Removal and remedial support constitutes the largest component of the Program Support category and represents approximately 14% of total projected obligations over the next 10 years. Activities funded include initial site discovery and investigation, hazard ranking, NPL listing, laboratory analysis and related costs associated with sampling efforts, investigations of potential removal actions, technical assistance and training to States and other parties involved in removal and remedial actions, and program evaluation/control activities of the hazardous substance response program.

Work of the other Federal agencies also represents a significant portion of projected Program Support obligations. Work of the Department of Health and Human Services, Department of Justice, U.S. Coast Guard, and others is projected to require approximately 4% of total obligations over the next decade.

b) Please break down the legal costs and how you defined them?

Legal costs are considered to be a portion of the Agency's overall enforcement costs. Legal costs include the costs associated with:

- negotiations for privately financed response;
- development and issuance of administrative orders to compel responsible parties to respond;

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- initiation and support of civil, criminal and cost recovery cases referred to the Department of Justice;
- cost documentation and assembly;
- expert witness consultation and testimony;
- case preparation and presentation by DOJ attorneys.

In addition, there are enforcement support activities which the Agency has included in its projections. These include:

- data collection and analysis (e.g., water and soil sampling, engineering and geological studies);
- report preparation;
- quality control and assurance, including chain of custody procedures.

Enforcement costs are expected to represent approximately 12% of total costs over the next decade. Litigation costs, as a subset of enforcement costs, are expected to decline over the next decade as the government and responsible parties endeavor to settle their differences outside of litigation. Now that the liability rules have been set, parties can focus their attention on remedy rather than on liability. Moreover, as remedies are reviewed on the record, the legal costs associated with challenging remedies will diminish. As for the support costs, these activities will be carried out even where there is no litigation. Many of the most expensive enforcement activities, such as data collection and review, quality assurance and control, and report preparation, will be carried out regardless of whether litigation occurs.

c) Please define administrative costs in that context?

The Administration component of Administration, Enforcement and Program Support consists of those activities contained in the Management and Support portion of the Agency's Superfund budget. Activities include Headquarters and Regional financial and administrative management, space, utilities and related expenses, ADP support, and costs of the Offices of the Inspector General, the General and Regional Counsels, Policy, Planning and Evaluation, and the Comptroller. Together, these activities are expected to consume approximately 2% of total Superfund obligations over the next ten years.

- d) It is said that the Department of Justice and EPA maintain accounts for the billing of lawyers and other time measure expenses. Please describe any such system, where it is run, and what information it could provide?

EPA's Financial Management Division (FMD) maintains site specific accounts for each Superfund site in its Financial Management System (FMS). The FMS maintains a record of all EPA employee hours and associated salary that is charged to a Superfund site. Employees (both technical and legal) maintain bi-weekly timesheets of their site specific hours. These timesheets are the basis for records maintained in FMS. The FMS also maintains records of EPA employee travel associated with a particular site and site-specific contract obligations and disbursements.

The Department of Justice's Lands and Natural Resources Division (LNRD) receives Superfund money for litigation support of Superfund cases through an Interagency Agreement with EPA. LNRD allocates actual costs between the Division's regular appropriation and the Superfund transfer appropriation based on the level of effort expended by professional employees directly on cases. The Division's level of effort on Superfund cases will be determined by comparing Superfund case hours to total Division case hours. This information is maintained in the Division's Legal Time System. (Professional employees maintain weekly timesheets of individual case hours worked). The ratio of Superfund hours to total Division hours will be used to allocate a percentage of all Division costs (maintained in DOJ's payroll and accounting system) to the Superfund transfer allocation.

- e) Do you have any information comparing administrative costs or legal costs faced by private parties and those of the government? If not, please suggest areas where such a comparison could be pursued and how it might be done?

The Agency does not have access to reliable information on the administrative costs or legal fees charged to private parties in Superfund actions. Any comparison of governmental and private party legal or administrative costs that might be conducted would require the availability of such private

party data. Moreover, a comparison of legal costs is not likely to yield any meaningful data given the disparity between government and private legal fees. Given the limited resources available, however, the Agency makes every attempt to minimize its own legal and administrative costs.

- f) Have any other parts of the government, in addition to EPA and the Department of Justice, studied the matter of transaction costs in the Superfund context?

We are not aware of any studies on the legal and administrative costs associated with litigation under Superfund. The GAO in its evaluation of the section 301(a) studies provided alternative program estimates which may have included alternative transaction costs. No other Federal agencies were consulted regarding specific "transactions costs" of conducting Superfund activities. Instead, an estimate was developed for all "Other Agency Support", based on the current (FY 85) support ratio.

- g) Does the EPA or any other government office plan to monitor the issue of transaction costs in the future? Are you or anyone else planning to study ways in which such costs could be cut?

For cost recovery, budget, and management reasons, the government will, of course, continue to monitor its own expenditures. Further, like all Federal agencies, EPA is acutely aware of the need to effectuate savings wherever possible and takes every opportunity to do so. At present EPA does not have plans to monitor private legal costs relating to Superfund litigation.

In this connection, the Administration included several provisions in its Superfund bill to keep down legal costs. As noted above, the Administration hopes to keep down the costs associated with challenging remedies by providing for record review of remedial decisions. Similarly, by providing for contribution protection where parties settle with the government, the Administration hopes to promote settlements and cut down on the litigation costs associated with contribution actions. Furthermore, by providing for Section 104 consent orders, the Administration hopes to encourage responsible parties to undertake investigations and feasibility studies without litigation. Finally, the Administration consciously decided not to include a citizen enforcement or federal cause of action in its bill, in part out of concern that such provisions might foster substantial litigation that is not related to site cleanups.

2). In motions filed in the Conservation Chemical case, it was recently suggested that pre-trial litigation costs alone would exceed the projected clean-up costs.

- a) What does this suggest about the operation of the Superfund?

Total government expenditures for investigations, administration, enforcement, and litigation in the Conservation Chemical case as of February 1985 are \$2,028,608.63. At eight and three-eighths percent interest, the present value for 30 years' operation of the government's preferred remedy in that case is \$29,522,000.00. Thus, government expenditures amount to approximately seven percent of projected cleanup costs.

In a motion filed by a third party defendant, pre-trial costs for third party defendants in the Conservation Chemical case were estimated at \$4,816,000 to \$11,682,000. These speculative, unverifiable estimates range from 16 to 40 percent of projected cleanup costs for the government's preferred remedy. The underlying premise of the question - that pre-trial litigation costs will exceed projected cleanup costs - is correct if at all only in relation to the costs of certain remedies that have been proposed by the defendants and which the government believes are not adequate.

Moreover, the high litigation costs associated with this case are due largely to the actions of the defendants, not the government's conduct. In this case, the government sued a limited number of parties for complete cleanup of the site under the theory of joint and several liability. The government determined that the parties sued are responsible for at least 80 percent of the waste by volume at the site, and for the most hazardous waste at the site. As you know, the CERCLA enforcement provisions, Sections 106 and 107, do not prevent PRPs that are defendants from impleading others as third party defendants. While we agree that contribution actions, following the government's case, may be appropriate, impleading numerous third parties has been used by some PRPs as a strategy to delay the resolution of the government's suit in which they are named as defendants. This strategy increases litigation costs by forcing the smaller generators to participate in the government's litigation even though their ultimate

share is too small to warrant such costly participation. As a result many third party defendants have complained to Congress.

Section 202 of S.51 (section 202 of S.494) would amend section 107 of CERCLA to clarify that contribution actions may be heard only after a judgment or good faith settlement is reached. This amendment would certainly expedite and reduce costs in such cases as Conservation Chemical.

Furthermore, the Agency's current policy of negotiating for the remedial investigation and feasibility study prior to initiating litigation and initiating such litigation only after the conclusion of the RI/FS and identification of the appropriate remedy will conserve resources of all parties. It is estimated that over a year of fruitless negotiation on identification of the appropriate remedy in Conservation Chemical could have been saved under this policy.

- b) How many other cases have or will involve transaction costs approaching the level of clean-up costs? What is the usual ratio of transaction costs to clean-up costs to date and what do you anticipate in the future?

The Agency has not yet conducted any studies or analyses of comparative legal and other costs in the CERCLA litigation context, and cannot provide a usual ratio of such costs to cleanup costs. However, the Agency believes that its enforcement related costs are not a significant portion of the total response costs. The Agency is not aware of any cases in which government's enforcement costs approach the level of cleanup costs. With regard to the legal costs of defendants, the Agency lacks sufficient data to formulate an answer. In all events, however, conclusions should never be drawn from a single case. The government may be forced to litigate in certain cases when the parties will not settle, or when for precedential reasons the government must pursue the case. Any evaluation of legal costs should take into account the entire enforcement program.

- c. Some suggest that the transaction costs of such cases will decline as greater experience with this type of litigation is achieved. Do you accept this argument? If so, please outline specific areas where you anticipate declines in such costs. Also, outline specifically the experience since the enactment of Superfund, showing any areas where transaction costs are declining.

For the reasons noted, it seems quite likely that enforcement costs will decline as experience increases. In particular, less litigation will be needed concerning the specific legal rules governing responsible party liability, for these rules are now relatively well established. Litigation costs,

however, are but a small percentage of total cleanup costs. Certain costs, such as contract management and technical support, are more fixed than variable because they are necessary expenditures whether a case is litigated or resolved in an alternative manner. As noted, however, the Agency has not yet conducted any definitive studies or analyses of transaction costs.

- d. Some suggest that the transaction costs are high because of concern over joint and several liability and the potential for ruin that even some small contributors might face at a given time. Please respond to this industry argument.

EPA is not aware of any evidence that supports the suggestion that transaction costs are increased by the existence of joint and several liability under Superfund. As EPA and the Justice Department have noted in the past, joint and several liability facilitates the settlement of Superfund cleanup litigation and provides an incentive for private parties to cooperate among themselves in settling such lawsuits. Accordingly, joint and several liability, if anything, reduces transaction costs.

While some have suggested alternative schemes of liability, the government is concerned that an alternative scheme of liability is likely to result in a more complex, resource intensive, and costly enforcement process for both the government and responsible parties. For example, the delay associated with apportioning costs in advance of judgment or settlement is potentially so great that the government may be forced to undertake the cleanup itself in most instances. This is because each party at a multi-party site would have both the ability and incentives to litigate its own separate share of liability against the Government.

In addition, the current scheme of joint and several liability encourages responsible parties to negotiate and coalesce and to develop consensus positions. Many responsible parties currently prefer to settle with the government for cleanup or costs, due in part to the existing potential joint and several liability. Those settlements may not occur if responsible parties are confident of limited liability in a Section 106 or cost recovery action.

Moreover, an alternative liability scheme could place a tremendous burden on de minimis parties in regard to factual showings. De minimis contributors may not be able to afford the costs of collecting the data and evidence needed to establish their shares.

3) In your discussion of Superfund reauthorization, EPA has emphasized the need for rapid clean-up as a primary goal. You have also suggested that anything that slows clean-up, no matter how well-intended, could inadvertently increase the risk to public health that led the nation to decide to undertake the Superfund in the first place. Please discuss any studies you have on the matter of increased public health risk from delay of clean-up, or any other information supporting your view. In particular we would be interested in any quantitative evaluations of the matter.

EPA has not done studies of the increased public health risks due to delays in Superfund cleanup activities. However, we realize that if delays in removal or remedial activities at certain sites do occur, it could potentially result in increased public health risks.

EPA's highest priority is to respond to threats to public health and the environment posed by uncontrolled hazardous sites and spills of hazardous substances through our Superfund removal program. Early and expeditious removal actions by EPA at sites on the National Priorities List can reduce, by many months, exposure resulting from active releases, or avert exposure from potential releases in order to protect public health and the environment. Additionally, we perform removals at non-NPL sites to abate immediate threats from hazardous substances and pollutants or contaminants through surface cleanups and other quickly implemented response measures. In the remedial program, we are rapidly moving sites through the planning process to produce timely, good quality remedial investigations and feasibility studies, that will facilitate the design and construction phase. A discussion of EPA's plans for further streamlining the CERCLA program to facilitate more rapid cleanups is contained in the preamble to the proposed National Contingency Plan revisions published in the Federal Register on February 12, 1985, on pages 5863-5870.

4) How long does it take to litigate to judgment and to actual recovery of final judgment in cost recovery cases? Give examples related to actual cases?

Discussion of Superfund site cleanup activity and associated cost recovery of those cleanup costs should distinguish between NPL and non-NPL site activity.

Non-NPL site cleanup generally refers to emergency or immediate removal actions which are authorized under section 106 of CERCLA. EPA maintains, as a general policy, that cost recovery actions for these removal actions are to be initiated after the emergency response action is completed and total site costs can be calculated.

Recovery of the cost of response activity at NPL sites is somewhat more complex. Responsible parties have an opportunity to participate in or conduct the RI/FS, leading to the choice of remedy, subject to Agency oversight. It is EPA policy not to initiate cost recovery action or negotiations with responsible parties to undertake the actual site cleanup until a Remedial Investigation/Feasibility Study (RI/FS) has been completed. After the RI/FS has been completed, negotiations for Remedial Design/Remedial Action (RD/RA) will be initiated. These negotiations would include the recovery of costs incurred at the site to date. If negotiations are successful, the Fund will be reimbursed for costs incurred to date and the responsible parties will undertake the RD/RA. If negotiations are unsuccessful, Fund financed RD/RA would proceed. In the meantime a civil action would be pursued by the Agency to recover costs incurred at the site.

The following chart depicts, for several cost recovery actions, the length of time between completion of the removal action, referral of the case from the Regional Office to EPA Headquarters and settlement of the case. Virtually all Superfund cases eventually settle.

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<u>SITE</u>	<u>REMOVAL COMPLETION</u>	<u>REFERRAL TO HQ</u>	<u>SETTLEMENT</u>
Diamond Alkali 1	6/83	9/84	1/85
Lenoir	10/82	3/83	4/84
Dreyfus St.	10/81	4/82	1/85
Plastifax	6/82	9/82	6/84
Nickel Solution	4/83	9/83	7/84
American Surplus	4/82	9/82	6/84
Petro Processors2 (NPL)	6/81	6/82	2/84
A & F (Greenup)3 (NPL)	5/82	1/83	6/84

1. Sampling initiated. 2. Site inspection. 3. First Fund
removal completed.

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5) What is the ratio between EPA/DOJ legal and administrative costs and actual amounts ultimately recovered in cost-recovery cases?

Each year, DOJ receives from the Fund a specified sum to conduct Superfund litigation. DOJ receives this funding pursuant to an interagency agreement with EPA. The following amounts have been billed to the Fund pursuant to these agreements:

FY 82:	\$ 1.168 million
FY 83:	2.654 million
FY 84:	3.071 million
FY 85:	5.020 million (agreed to be transferred to the Department)

As the cost recovery and injunction statistics set forth below reveal, our estimated recoveries from litigation have been substantially greater than the amounts received from the Fund for litigation. Our combined recoveries under CERCLA sections 106 and 107 and RCRA in terms of dollar amounts and the estimated value of the removal and remedial actions achieved through judgments and consent decrees have been as follows:

FY 82:	\$57 million
FY 83:	62 million
FY 84:	119 million

These amounts, totalling almost \$240 million, clearly indicate the overall cost-effectiveness of the Administration's enforcement program and the success of the enforcement program in providing an incentive for responsible parties to reach agreement with the United States on their potential liability under CERCLA and RCRA.

The following chart presents a sampling of cost recovery settlements with the amount recovered, the amount of administrative costs incurred and the amount of DOJ litigation support costs. For the purpose of this chart, administrative costs include all EPA payroll charged to the site (both technical and legal), and all travel charged to the site.

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<u>SITE</u>	<u>AMOUNT RECOVERED</u>	<u>ADMINISTRATIVE COSTS</u>	<u>DOJ COSTS</u>	<u>COST AS A % OF RECOVERY</u>
Diamond Alkali	\$1,835,600.00	\$36,148.49	-	1.9%
Lenoir	113,000.00	18,927.33	6,121	22%
Dreyfuss Street	259,600.00	15,749.76	27,770	16%
Plastifax	226,369.00	16,381.72	3,338	8%
Nickel	199,500.00	23,917.23	1,841	12%
American Surplus	138,400.00	22,378.34	7,283	21%
Petro Processors	600,000.00	73,524.79	183,884	.5%
	(50,000,000.00	remedy to be conducted by defendants)		
A&F (Greenup)	490,000.00	50,499.86	195,646	5.5%
	(4,000,000.00	remedy to be conducted by defendants)		

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6) What is the time frame that you envision, in cost-recovery actions, between initiation of litigation to the actual beginning of cleanup in the coming years? How does this compare with the experience to date?

The time frame for enforcement action is set out on the following chart. We currently estimate approximately six months for case development, and a year to two years for litigation, depending on the complexity of the litigation.

Litigation in some cases to date has taken longer than these time frames contemplate. This can be attributed to the fact that, for many early CERCLA and RCRA 7003 cases, litigation was initiated before remedial investigations and feasibility studies were conducted. The government sued responsible parties before the appropriate remedy had been identified, thus increasing the complexity of the issues potentially subject to litigation. In addition, many issues were negotiated in the course of litigation. Under the current process, there are a number of opportunities for negotiations with responsible parties prior to the initiation of litigation. These changes shorten the time needed for litigation, and increase the likelihood that negotiations will be successful, thus reducing the need for litigation.

In cost recovery actions, cleanup is initiated before litigation. Agency policy is to initiate action to recover costs as soon as practicable after the Agency chooses the appropriate remedy for the site and develops its Record of Decision.

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I	II	III	IV	V	VI	VII
PRELIMINARY ASSESSMENT/ SITE INVESTIGATION	NPL LISTING	RESPONSIBLE PARTY SEARCH	NOTICE LETTER ISSUANCE	RI/FS DEVELOPMENT	NDD/DRAFT ROD	RECORD OF DECISION ON REMEDY

60 days public comment	ASAP after it is determined that site will be proposed	At least 60 days before RI/FS is obligated	Approx. 18 months	60-120 days
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VIII	IX	X	XI
CASE DEVELOPMENT	LITIGATION	DESIGN	CONSTRUCTION

6 months	1/2 cases: settle 1/4 cases: 1 year 1/4 cases: 2 years	9 months	1 year
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7) How many National Priority List sites involve cost recovery litigation?

Case referred to EPA headquarters:	4	NPL
Cases referred to DOJ:	17	
Cases Filed:	49	
<u>TOTAL</u>	<u>70</u>	<u>NPL sites</u>

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8) Please provide specific numbers (and any accompanying assumptions) of the comparative cost if EPA provided money immediately for cleanup at remedial sites as soon as the cleanup plans were complete, rather than after litigation. Assume for this purpose that there are no costs for litigation whatsoever. Also provide information as to the amount of time that would be saved.

Specific numbers on comparative costs are not available. Generally, the remedy for Fund-financed cleanup is the same as the remedy for private party cleanup. Therefore, the costs should be the same, except as adjusted for inflation and for the costs of litigation. We note that if a Fund-financed remedy is initiated, litigation costs will eventually be incurred in a cost recovery action.

The time potentially saved by proceeding with Fund-financed cleanup varies with the complexity of the litigation. The Agency currently assumes six months for case preparation, and one to two years for litigation. We anticipate that many of these cases will be settled before litigation proceeds to completion. More details on the timing of the enforcement process are set out in the answer to question 6.

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9) Please suggest any areas of improvement in the CERCLA statute or its implementation that could/will lead to reduced transaction costs. Also state what EPA believes to be an "acceptable" level of transaction costs in this area, given the other resource needs of the Agency and the nation. Please be specific in your answers and assumptions.

As set forth in the section-by-section analysis accompanying the Administration's bill, the Administration proposed several changes to the statute which the Agency believes will minimize legal costs. One is the contribution amendment in S.51. and S.494 Section 202 (Section 202 of S.494) clarifies the existing law governing liability of potentially responsible parties in three respects:

- Parties found liable under section 106 or 107 will have an express right of contribution, allowing them to sue other potentially responsible parties to recover a portion of costs paid by the liable parties. While this may lead to some litigation, it is the Agency's view that this provision will encourage settlement by putting all parties on notice, whether sued by the government or not, that they may be held liable for their share of the cleanup or cleanup costs.
- Parties who reach a good faith settlement with the government are not liable for contribution claims from other liable parties. This provision will clearly limit litigation, by ensuring those who settle with the government that they are protected from additional litigation on cleanup costs.
- Contribution actions may be heard only after a judgment or settlement in good faith is reached with the government. This should limit the litigation costs of those parties not sued by the government and focus the government's case on remedy rather than liability. It is also the government's view that by postponing the hearing on contribution until after the government's case, the parties will settle without having to litigate.

In short, it is the government's view that these provisions will limit litigation costs by:

1. providing a greater degree of finality to settlements reached between EPA and responsible parties; and
2. expediting private party cleanup through simplification of the process of litigating imminent hazard enforcement actions.

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The Agency also believes, as noted above, that the provision relating to record review of remedial decisions will help to minimize legal costs, by focusing the court's and the parties' attention on the facts before the Agency at the time of the remedial decision.

Finally, the Agency is considering additional proposals to further encourage settlements and thereby limit legal costs. Indeed, it is the Agency's view that the debate on joint and several liability is misfocused. The real issue is how to improve the Agency's settlement flexibility to take care of many of the concerns that are now incorrectly aimed at joint and several liability. In this regard, the Agency is considering language that will enable the Agency to settle small cost recovery cases outside of a litigation context.

The Agency is also considering proposals that would give the Agency authority to use Fund money to make up certain differences in settlements. As soon as these proposals are finalized they will be forwarded to you and the Committee.

- 10) What is the status of EPA's study of the MITRE model and its "bias" toward mining site inclusion on the NPL that some have suggested? What are the specific purposes of the study? What conclusions will the EPA be better able to make as a result? What are the dates and deadlines it is on?

As you may know, EPA is currently reviewing the assumptions and technical data relevant to the Hazard Ranking System (HRS) in light of the data collected by the Superfund program over the last several years. In addition, we have carefully reviewed the report prepared by TRC Environmental Consultants for the American Mining Congress (AMC) which asserts that the HRS is biased against mining sites. The Agency's findings regarding the TRC/AMC report are that the report contains a number of errors, that the statistical techniques used were incorrectly applied, and that their findings are unsupported within the report. An example would be their contention that releases at mining sites are more easily observable than at other sites, when, in either case the observed releases are based on field sampling and laboratory analyses. Expressed differently, the "findings" are simply opinions lacking any scientific or technical basis as far as we can discern. EPA's detailed critique of that report is undergoing final Agency review, and we should be able to furnish you a copy shortly.

While we would reject the contention that the HRS is unfairly placing mining sites on the NPL, we believe that it may be possible to improve the way the HRS handles mining and non-mining sites. With five years of experience now in site investigations, the Agency now has a large body of data to use in reviewing the scientific basis for the HRS. Examples of the areas we are examining include the potential for air releases (the HRS currently only addresses observed releases for air), aquatic food chain contamination, geochemical attenuation of pollutants in ground water, and mechanisms for considering the concentrations of hazardous substances involved. What we are doing is the basic scientific and technical analyses that are prerequisites to proposing changes in the HRS, and we expect to conclude some of those analyses by the end of summer. At that time we will decide whether revision of the HRS is warranted in light of the costs (e.g., additional data collection costs) and potential benefits of such revisions.

Senator STAFFORD. Thank you, Senator Simpson.

Senator Mitchell?

Senator MITCHELL. Thank you, Mr. Chairman.

Senator STAFFORD. Before you begin, Senator, could I just ask Mr. Thomas how his time constraints are? Can you stay a while longer?

Mr. THOMAS. Yes, sir.

Senator STAFFORD. All right. Thank you.

Senator Mitchell?

Senator MITCHELL. Well, because he has been here a while and we are very appreciative of that, I will be brief, Mr. Chairman, and I will submit other questions in writing, but I just did want to ask a couple more.

Senator STAFFORD. Sure.

Senator MITCHELL. And I thank you, Mr. Thomas, for your patience in staying here today.

Just to conclude our discussion on the subject to victim compensation, I want to say that I am very much aware of the problem of creating a new program that would be subject to abuse or that would grow far beyond anyone's expectations and, the need, especially at a time of budget restraint, to act in a prudent manner. That is one of the reasons why we worked so long and hard. It has been several years now to try to devise a means for doing that, and we are now working in good faith with Senator Simpson and his staff. I earnestly and sincerely invite representatives of the administration to participate in that effort. It is the totally negative approach that I find most discouraging about the process, and unwillingness to even try to address it in a serious way. I hope that we can do that.

It may be that we cannot succeed. It may be that there is no common ground. It may be that we are unable to devise any legislation that can accomplish the goals that we share. But I hope that an effort will be made, because it is a very serious problem.

I would like to ask you, Mr. Thomas, as you know there has been some discussion recently about the difficulty of obtaining insurance being encountered by firms involved in hazardous waste disposal as well as those involved in cleanups. I have discussed this problem with you before. Could you describe the recent agreement that EPA entered into with Clean Sites Inc., a private corporation which I understand indemnifies it in certain—is it some sort of agreement to indemnify it in certain cleanup situations?

Mr. THOMAS. Senator, the issue of insurance, as we indicated earlier, is a major concern to us as it is to members of this committee, particularly the availability of environmental impairment liability insurance for nonsudden events as required under RCRA, the availability of insurance generally, particularly as it relates to hazardous substances or hazardous waste. As you and I discussed earlier, we have seen the availability of that insurance shrink dramatically over the last number of months, and we are trying to fully explore just what are the causes and what are possible solutions to this problem with the insurance industry.

Clean Sites Inc., as I am sure you are aware, was a nonprofit operation that grew out of an effort between certain environmental interest groups and industry interest groups to determine whether

there was something that could be done in the private sector to deal with the site cleanup problem beyond what we were doing in Government, or what was being done by private sector alone. Out of that came a recommendation for a pilot effort which, in turn, became known as Clean Sites Inc., the entity that was established.

That group is to undertake a number of activities, including coalescing of responsible parties at a particular site, the provision of technical resources and technical assistance in trying to determine how to clean that site up.

As far as the Government is concerned, we would enter into an arrangement with firms that Clean Sites was working with just as we would with any other firm if we became involved with them. That would be through a formal arrangement. In other words, if those firms wanted to clean up a site, we would either have a consent decree or a consent order with those firms to proceed with it.

Where Clean Sites ran into problems was in that early stage where they were working with a few firms to try to coalesce the group to try to come to grips with what the problem was, to try to develop a proposal for cleanup up the site. They found that, because of their mission and because of their relative newness, they were not eligible for any insurance, either for their employees or for their members, that would cover actions that they took that could result in litigation at some later date because of claims that their action was either inappropriate or caused, directly or indirectly, some harm.

We think the possibilities of that happening would probably be fairly small, but it was certainly a real problem that they faced. We felt they were a unique group whose purpose was a meritorious purpose. They came to us as we reviewed the issue. We did draft a narrowly defined agreement as to how we could indemnify them on a case-by-case basis. If they were initiating an action at a site where we approved of the action, we would only indemnify them for that action up to the point where responsible parties were identified that would take action at that site. At the point, it would be the responsible parties that would have to cover their liability, not the Government.

So, in a narrowly drawn set of cases on which we worked with the Justice Department in crafting, and on a site-by-site basis, and in addition to any insurance that they would have to maintain, whatever was available, we indicated that we would indemnify in that narrow range. We felt that that was something that was important for us to do, given the potential benefit that could accrue from that pilot effort.

Senator MITCHELL. Would you, at your convenience, have your counsel submit a letter describing the agreement in writing and the legal basis on which the EPA entered into it, that is, what the basis was for entering into it?

Mr. THOMAS. We would be pleased to do that. (See p. 116.)

Senator MITCHELL. On the subject of insurance, I understood Senator Bentsen to say earlier that because of developing problems in this field, the number of State court decisions which give rise to concern among insurers, I am familiar with some but not all of them, he has suggested that there be hearings after this committee acts on the bill but before the Finance Committee.

Mr. Chairman, I would like to say that I share that view and I think it is something we should look into. This is, obviously, a growing problem and one with which we must be concerned, because we can do whatever we want here, but if there are developments in the insurance field as the result of several State court decisions, I think we should be aware of them and be prepared to deal with that.

Senator STAFFORD. I have made the statement that if the insurance industry concludes that they have something they would ask us to consider—they did not have last week—that we would hold hearings and if the committee agreed on some action, we would take it to the floor as a committee amendment.

Senator MITCHELL. I just have a couple other questions, Mr. Chairman, and what I would like to do, Mr. Thomas, is just ask the questions and then ask you to submit responses later. I don't want to tie you up any further and I know the chairman and Senator Simpson need to go as well.

I would like to ask you to explain why the administration is proposing to modify the health authorities provision of the legislation. As you know, you have proposed to make discretionary the provision of health assessments as hazardous waste sites, to remove the requirement of current law that the Agency for Toxic Substances and Disease Control establish and maintain an inventory of literature, research, and studies on the health effects of toxic substances, and you would propose to remove the current requirement that, in cases of public health emergencies, that agency provide medical care and testing to exposed individuals. That would no longer be mandatory; it would be discretionary. I would like to have you explain and justify those proposals and also indicate what, in your view, the impact of these changes would be on the current activities of the Agency for Toxic Substances and Disease Control.

Mr. THOMAS. Senator, we will be glad to respond to that in writing. I can assure you we in no way want to diminish the kind of attention we have been providing with CDC to health related issues, and we are attempting to try to clarify existing policy between the agencies.

Senator MITCHELL. You have also made a number of proposals to modify the EPA's response authority under the legislation. I would like to ask you if you would just please describe the responses EPA has made over the past 4 years under the current law which would not be possible if the administration's proposal became law as one category, and in a second category, responses which, in your judgment, could have been made under the current law in the past 4 years but were not and which would also not be possible in the future and the reasons for the suggested modifications.

Mr. THOMAS. Will do that, Senator. I don't believe any of the responses we made during the last 4 years would be excluded by that proposed language, but we will respond to those in writing.

Senator MITCHELL. OK, fine. I thank you very much.

Thank you, Mr. Chairman.

Senator STAFFORD. Thank you, Senator Mitchell, and thank you, Mr. Thomas. We will see you on Thursday and Friday.

Mr. THOMAS. Thank you, Senator.

Senator STAFFORD. The committee stands adjourned until 10 a.m. tomorrow.

[Whereupon, at 12:33 p.m., the committee recessed, to reconvene at 10 a.m., February 26, 1985.]

[Statements submitted for the record, responses to Senator Mitchell's questions, and the bills, S. 51 and S. 494 follow:]

STATEMENT OF
LEE M. THOMAS
ADMINISTRATOR
U.S. ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE
FEBRUARY 25, 1985

Mr. Chairman and members of the Committee, it is a pleasure to appear before you this morning. I am here to honor a pledge I made last year, to submit to you early in the 99th Congress this Administration's proposal to reauthorize the Comprehensive Environmental Response, Compensation, and Liability Act -- the Superfund.

We have learned a great deal about the problem of uncontrolled hazardous waste sites since Congress first enacted Superfund just over four years ago. Much has been accomplished using the authorities of the original law. Based on our first-hand experiences, as well as our vision of the problem that remains, it is time now to renew this program.

Let me say at the outset that implementation of Superfund is the Environmental Protection Agency's highest priority. Its reauthorization is my own top legislative goal. I will work closely with members of this Committee to extend and improve this vital statute.

The legislative proposal we are considering today has the full backing and support of President Reagan as is evidenced by the fact the President himself transmitted the legislation to you. As you know, the President again endorsed Superfund reauthorization in his State of the Union Message earlier this month.

Since 1983, we have made substantial progress in implementing the Superfund law. Long-term work is underway at hundreds of sites around the country. At hundreds of others, we have completed emergency cleanups and eliminated immediate threats to human health and the environment.

The charts before you summarize our progress to date. In a moment, I will provide you with a thorough briefing on where we have been under Superfund and where we are going.

Despite our progress, however, much remains to be done. We must take all steps necessary to assure that we do not lose our momentum. The legislation we present today is designed to build upon that momentum. It will allow us to get the cleanup job done as quickly and completely as possible.

Overall, this legislation will give us the tools we need to continue implementing Superfund at the accelerated pace we established during the past two years. Our proposal:

- o Triples the resources available for cleaning up hazardous waste sites.
- o Focuses those resources on the most serious problems.
- o Strengthens our enforcement capabilities and ensures that responsible parties pay for and conduct more cleanups.
- o Enhances the roles of both Federal and State governments in undertaking response action.
- o Guarantees a meaningful role for affected citizens in selecting cleanup options.
- o Assures an adequate, stable, and equitable financial base for the program.

The \$5.3 billion program we propose today, coupled with an aggressive enforcement effort, will yield dramatic results during the second five years under Superfund. By the end of fiscal year 1990, we project engineering studies -- the first step in the full cleanup of a priority site -- will have been started at nearly 1,500 sites. Actual construction will be underway or completed at more than 900 sites. In addition, by the end of fiscal year 1990, emergency cleanup actions at over 1700 sites will have been undertaken.

This legislation is the product of months of intensive effort on the part of the executive branch. The bill we offer is a consensus document reflecting this Administration's view of one of the most pressing environmental issues facing this nation.

I have personally played a leadership role in preparing this package. I will continue to be involved in the reauthorization of Superfund.

While I am completely comfortable with the legislation we present today, I will be candid with you. It raises some difficult issues with which Congress must grapple. It recognizes and respects our experiences to date, and suggests statutory changes to allow us to proceed more effectively with the original challenge of Superfund. It modifies the taxing mechanism in an attempt to provide the resources we will need to continue getting the job done.

The Response Program

There can be no doubt that the public recognizes Superfund as government's primary tool for addressing environmental and health threats posed by abandoned hazardous waste sites. Indeed, the legislative history of Superfund centers on "inactive," "uncontrolled," and "orphan" hazardous waste sites.

However, response authorities in the present law are much more sweeping in scope. They have the potential to dilute our scarce Superfund resources among non-site-related releases, situations posing minimal public health threats, and other circumstances.

Our proposal focuses those resources on sites that pose the most serious potential threat: uncontrolled and abandoned hazardous waste sites; municipal and industrial waste disposal facilities; sites regulated under the Resource Conservation and Recovery Act but held by insolvent firms; and spills and other releases of hazardous substances. In addition, the bill permits the President to take action at any site where the release of hazardous substances poses the threat of a major public health or environmental emergency and authorities or capabilities do not exist for response in a timely manner. In focusing our attention, we establish a more concerted effort to clean up what we feel are the most dangerous sites in the nation.

In addition to clarifying the scope of response under Superfund, our proposal would improve and expedite cleanup in several ways. It better defines health-related authorities and the agencies responsible for implementing them. The bill

authorizes the establishment of benchmark cleanup standards for short-term and long-term actions. And it provides limited protection for cleanup contractors against claims for future response costs arising out of the work they perform for us.

The Enforcement Component

The enforcement provisions of this bill are critically important to our overall success in carrying out the second phase of Superfund implementation. During the past several weeks, I have been a visible and vocal proponent of aggressive enforcement stances in all EPA programs.

Enforcement was a major theme of my confirmation testimony before this Committee less than three weeks ago. Under Superfund, this bill gives us the opportunity to turn our words into substantive tools capable of yielding results.

As we continue to emphasize Superfund enforcement, we are proposing a series of statutory changes in our bill which, taken together, will help ensure that responsible parties play an increasingly important role in cleaning up hazardous waste sites. These changes should be viewed within the context of our continued reliance on the strict, joint and several liability of responsible parties at Superfund sites.

Our bill would:

- o Increase all criminal penalties to \$25,000, all civil penalties to \$10,000, and create civil penalties to augment criminal sanctions where they do not already exist.

- o Expedite civil actions by requiring that separate suits be brought against other potentially liable parties for contribution after judgment or settlement in enforcement actions.

- o Clarify governmental access and information-gathering powers and establish the authority to enforce them.

- o Preclude pre-enforcement review of selected response actions while maintaining safeguards against arbitrary and capricious selection of remedies or use of orders.

- o Impose Federal liens for response costs upon all real property owned by responsible parties affected by an agency response action.

- o Clearly establish foreign vessel owners' and operators' liability for releases from their vessels.

The above authorities will do a great deal to enhance our enforcement capabilities. This, in turn, will increase our ability to foster responsible party cleanups and to recover costs where site actions are paid for by the fund.

Aggressive enforcement will supplement the cleanup efforts we undertake using the fund. I expect responsible parties, responding to our tough enforcement posture, to sign settlements valued at between \$400 million and \$500 million during fiscal year 1986. That's three times the level of settlements for fiscal 1984, which was a record year in itself.

Private-party cleanups between 1986 and 1990 are expected to total approximately \$2 billion. When coupled with fund-financed activities, this will effectively yield some \$7.5 billion in total cleanup activity during that second five-year period.

Federal-State Relationships

A strong, clearly defined Federal-State relationship is also essential to the success of our Superfund program. Through carefully crafted administrative steps, we have delegated substantial decision-making authority to the states during the past two years. Our legislative package complements this trend and prescribes a greatly expanded role for the States.

The States would become increasingly active partners in making Superfund work. We offer them the opportunity to play a far more substantive role in managing actual site cleanup for both short- and long-term actions, and to have a more meaningful stake in the program's cost efficiency. We would also add clarifying language to the existing law allowing cooperative agreements between EPA and the States to cover more than one site. Enforcement costs would be included in these agreements.

New language would put an end to the current preemption of State superfund-like taxing statutes. States would be permitted to raise revenues dedicated to hazardous waste site cleanup activities without constraint by similar Federal statutes.

We also look for the States to take on a somewhat larger portion of the Superfund cost burden. We propose that the States pay for 20% of the cost of long-term cleanup at sites where the State itself is not a responsible party. This would be an increase from the current 10% cost-share. Similarly, we would increase the State share from 50% to 75% for cleanup at sites where the State is the site operator.

Community Involvement

Since coming to EPA in early 1983, I have been committed to a meaningful role for affected citizens in the decisions of the Superfund cleanup process. Although the current law does not address this essential element in the cleanup equation, I established a community involvement policy shortly after taking over the hazardous waste program.

That program, and the process of involving citizens in Superfund activities, has helped those affected by our work to understand our decisions. It has also helped us to understand the concerns of these citizens.

Our proposal would require that affected citizens be notified of proposed cleanup action. They would be given an opportunity to comment on the proposed action and any alternatives. The objective of this amendment is to ensure community involvement in long-term cleanup actions.

One thing I learned first-hand as head of the Superfund program for two years is the deep, genuine concern of citizens for the health of their families, the maintenance of their property values, and the protection of their environment. The public must know that this agency makes its decisions in the light of day, after considering all responsible viewpoints. This amendment will lend greater credibility to our efforts to clean up hazardous waste sites.

Financing

In the final analysis, realizing all of the goals we have set for the Superfund program will depend upon an adequate and stable financial base. We believe that a blend of taxes together with interest on the unexpended fund balance and cost recoveries will give us the resources we need to accomplish our mission.

About 90% of the \$5.3 billion we project being generated by this mix of revenue sources over the next five years will come from taxes. One-third of these funds will be generated by feedstock taxes, while two-thirds will come from a waste-end tax.

The details of our legislation are set out in the fact sheet and the section-by-section analysis that I have attached to my testimony.

In closing, I want to stress again that our legislative proposal is a strong and balanced approach to the hazardous waste site cleanup problem that is before us. This bill will triple the resources available to us for cleanup activities, strengthen our enforcement capabilities to foster private-party cleanups, and focus all activities on those sites posing the greatest risks to human health and the environment.

I am proud to present this legislation to this Committee. The staff of many agencies have worked very hard putting it together. I urge you to consider its provisions carefully in crafting a bill to reauthorize Superfund.

Thank you very much.

SUPERFUND REAUTHORIZATION FACT SHEET

President Reagan transmitted to Congress February 22 the Comprehensive Environmental Response, Compensation and Liability Act Amendments of 1985. The bill would reauthorize Superfund for five years.

Summary of Key Provisions

o Resources: More than triples funds available for Superfund activities over current law. Existing law established a \$1.6 billion trust fund through fiscal year 1985. The proposed reauthorization would generate \$5.3 billion between fiscal years 1986 and 1990. Approximately 90 percent of these funds would be raised through a tax on petrochemical feedstocks and the management of all RCRA hazardous wastes (1/3 feedstock; 2/3 waste end).

o Scope: The proposed bill would concentrate EPA resources on hazardous waste sites. These are the sites Congress originally intended that Superfund focus on. The response program in the Administration's bill would address abandoned and uncontrolled hazardous waste sites, municipal and industrial waste sites with problems, and sites governed by the Resource Conservation and Recovery Act but held by insolvent companies. In addition, the bill includes a "safety valve" that enables the President to respond to any hazardous substance release that constitutes a major public health or environmental emergency.

o Enforcement: The proposed reauthorization contains several major changes in EPA's enforcement program. They are designed to ensure that responsible parties conduct and pay for more cleanups. Key enforcement provisions would:

--Increase all criminal penalties \$25,000; all civil penalties would increase to \$10,000. New civil penalties would be created to augment criminal sanctions where they do not already exist.

--Expedite civil actions by requiring that separate suits be brought against other potentially liable parties for contribution after judgment or settlement in enforcement actions.

--Specifically define governmental access and information-gathering powers and establish the authority to enforce them.

--Impose federal liens for response costs upon all real property owned by responsible parties affected by an agency response action.

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It is expected that these new authorities will significantly supplement fund-financed cleanup activities. In fiscal year 1986, EPA expects responsible parties to conduct cleanup work worth between \$400 and \$500 million. Through 1990, we expect these cleanups to total some \$2 billion, bringing the estimated value of all Superfund activities over the next five years to nearly \$7.5 billion.

o State Responsibilities: The current law's preemption of state superfund-like taxing statutes would be eliminated. States will be able to raise revenues for their own cleanup activities. The proposal also promotes multi-site cooperative agreements and allows state enforcement costs to be eligible for funding. The states would be required to pay an increasing share of the cost of cleaning up sites. The state matching share for sites where the state is not a responsible party would increase from 10 percent to 20 percent. For sites where the state is the site operator, the state share would increase from 50 percent to 75 percent.

o Community Involvement: The proposal would make it a statutory requirement that affected citizens be notified of proposed cleanup actions. They would also be given the opportunity to comment on any proposed action and on alternatives. This amendment applies to all long-term cleanup actions, whether they are fund-financed activities or the result of enforcement action.

o Projections: As a result of these provisions, EPA projects that through fiscal year 1990, engineering studies will have begun at over 1,500 sites. Actual construction will be underway or completed at 920 sites. In addition, we will have undertaken emergency cleanup actions at 1,741 sites.

SUPERFUND REVENUES FACT SHEET

In designing a tax to raise revenue for funding the Superfund program, EPA sought to meet the following objectives:

- to provide a stable and predictable source of revenue;
- to broaden the base from which revenue is received;
- to minimize adverse economic impacts on industries;
- to impose the tax on the type of industries and practices that have caused the hazardous substance release problems Superfund was designed to address;
- to encourage a reduction in the quantities of hazardous waste generated and to discourage the management of hazardous wastes in surface impoundments and landfills.

EPA's proposed amendments to Superfund seek to raise approximately \$5.3 billion to finance the program over the next five years (from FY 1986 to FY 1990).

EPA proposes to raise \$5.3 billion from three sources:

- 1) Feedstock: A tax on crude oil and 42 petrochemicals and raw materials used in the production of chemicals that contribute to the hazardous substance release problem addressed by Superfund.

The feedstock tax base and tax rates are the same as the current tax used to finance Superfund since 1980.

This tax is designed to raise approximately \$300 million per year over the next five years.

- 2) Waste-management: Revenues from the management of hazardous wastes. This includes a tax on all hazardous wastes received at a qualified (i.e., RCRA-permitted) treatment, storage, or disposal unit, as well as hazardous wastes disposed of in the ocean or exported from the United States.

The tax would be imposed on the owners or operators of hazardous waste management facilities or vessels, and on exporters of hazardous wastes.

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The tax is designed to encourage alternatives to land disposal by imposing a higher rate on the management of wastes in landfills, surface impoundments, waste piles and land treatment units. This provision will complement the 1984 amendments to the Resource Conservation and Recovery Act, which direct EPA to consider restricting certain wastes from land-based units.

This tax is designed to raise approximately \$600 million per year over the next five years.

- 3) The remaining \$100 million per year would be derived from interest on Superfund investments, from fines, and from costs recovered from parties responsible for hazardous substance releases cleaned up by Superfund.

Superfund is currently financed primarily by the feedstock tax identified above in this fact sheet and money from general revenues (12 percent). The current tax, the general revenues, and interest on the fund has raised approximately \$1.6 billion to finance Superfund response activities since 1980.

SECTION-PY-SECTION ANALYSISEPA'S PROPOSED AMENDMENTS TO CERCLASECTION 1Short Title

The short title of the legislation is the "Comprehensive Environmental Response, Compensation, and Liability Act Amendments of 1985" (CERCLA Amendments).

SECTION 2Amendment to CERCLA

This legislation, which reauthorizes the Superfund program from FY 1986 to FY 1990, amends the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA or "Superfund").

SECTION 3Statement of Findings and Purposes

This section sets forth the findings and purposes of CERCLA. The major findings are that --

- o Releases and threats of releases of hazardous substances continue to pose serious threats to public health and the environment;
- o A major source of the hazardous substance release problem results from releases from uncontrolled hazardous waste facilities; and
- o To protect human health and the environment, a comprehensive Federal program is needed. The program must include strengthened enforcement authority, a Federal-State partnership and expanded citizen participation for effective response to hazardous waste sites and releases or threatened releases of hazardous substances.

The objective of this section is to clarify Congressional intent that the focus of the Superfund program should be on responding to releases or threatened releases of hazardous substances from uncontrolled hazardous waste sites.

SECTION 4Definitions

Section 101(14) lists those substances which are hazardous under CERCLA by reference to substances listed under five other environmental laws. Section 101(14)(C) includes as hazardous under CERCLA "any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act".

This amendment would clarify that a substance need not be a "waste" to be considered a CERCLA hazardous substance under this subsection, so long as the substance meets the criteria of section 3001 of the Solid Waste Disposal Act.

SECTION 101Authority to Respond

CERCLA section 104(a)(1) currently authorizes response action "unless the President determines that such removal or remedial action will be done properly by the owner or operator of the facility...or by any other responsible party." The amendment would clarify and confirm that the President has the discretion to decide when responsible parties are authorized to conduct cleanup in lieu of Fund-financed response.

This amendment is not intended to preclude or discourage responsible parties from conducting cleanup actions without the formal permission of the Federal government. The current requirements of section 105 of CERCLA (National Contingency Plan) contemplate a significant role for private parties in response actions.

The amendment is intended to clarify that the Federal government would not be precluded from conducting a response action, merely because responsible parties have indicated some willingness to take some form of response action. This amendment would confirm that if the Federal government determines that Federal response is needed, the President would have the discretion to determine the appropriate response and to take action; responsible parties would not be authorized to forestall Federal response.

Scope of Program

The language in the statute authorizes response to the release into the environment of any designated hazardous substance, or pollutant or contaminant which may present a threat to public health, welfare, or the environment.

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The amendment would focus Superfund response authority on the problems associated with releases of hazardous substances from uncontrolled hazardous waste sites. Specifically, the amendment would --

- delete "pollutant or contaminant" from the Act;
- delete "welfare" from the phrase "public health, welfare, and the environment" in the Act;
- authorize response whenever there is a release or substantial threat of a release into the environment which may present a "risk" to public health or the environment; and
- prohibit Superfund response from certain categories of releases, unless the President determines that a major public health or environmental emergency exists and that no other person has the authority or capability to respond in a timely manner --
 - from mining activities covered by SMCR;
 - from the lawful application of pesticides registered under FIFRA;
 - affecting residential, business, or community structures when contamination is not caused by a release from a hazardous substance treatment, storage, or disposal facility;
 - affecting public or private domestic water supply wells when contamination is not caused by a release from a hazardous substance treatment, storage, or disposal facility;
 - from naturally occurring substances in their unaltered form; and
 - covered by and in compliance with a permit, issued under other federal environmental laws.

The effect of the amendment would be to ensure that Superfund responses are focused on those releases of hazardous substances which present the greatest threat to public health and the environment, and to enhance EPA's ability to effectively manage the program.

SECTION 102Statutory Limits on Removals

Section 104(c)(1) of CERCLA limits removal actions to six months in duration and \$1 million in cost unless certain waiver criteria are met. These criteria include: a finding that continued action is necessary to prevent or mitigate the emergency and to protect public health and the environment, and that assistance would not otherwise be provided on a timely basis. Because of the limits established in this provision, some removals have been scaled-down below the level needed to achieve a cost-effective response.

This amendment would provide an additional and independent criterion for waiving the statutory limits on removal actions and increase the six month duration limitation to one year. The new criterion would permit removals to exceed the \$1 million cost and one year duration limitations if the response action is "appropriate and consistent with a permanent remedy." The amendment would ensure that removals accomplish a more complete response, if such response is appropriate in that situation.

The primary effect of the amendment would be to enhance the President's ability to choose the most effective response in removal situations. Generally, the amendment would allow, where appropriate, the first operable units of remedial actions to be considered removals. This would provide the Agency with increased flexibility to quickly initiate the appropriate removal. This ability to implement a response quickly would enhance efforts to contain the migration of hazardous substances. In turn, this would result in increased public health and environmental protection and may be less costly since hazardous substances could be contained before they migrate to a much larger area requiring greater response.

SECTION 103Permanent Remedies

Section 104(c)(4) of CERCLA requires the selection of an appropriate remedial action that is consistent with the National Contingency Plan (NCP) and is cost-effective in light of concerns about protecting public health and the environment, considerations of Fund-balancing, and the need for immediate action. There is no explicit requirement that the selection of a remedial action take into consideration permanent solutions or alternative treatment technologies.

EPA currently considers the long-term effectiveness and the permanence of alternatives in its selection of the appropriate remedial action. This amendment would provide explicit Congressional approval of EPA's position and would allow revision of the NCP to implement this approach to permanent remedies.

SECTION 104

Offsite Remedial Action

Section 101(24) of CERCLA, which defines "remedy or remedial action", provides that additional threshold criteria must be met before the President may undertake off-site disposal of hazardous substances. This creates a bias against off-site disposal and reflects past Congressional and EPA emphasis on on-site land disposal as the preferred remedial action.

The objective of the amendment is to eliminate the statutory bias for on-site remedies by making the statute neutral with regard to on-site or off-site remedies.

Congress, as reflected in the 1984 amendments to the Resource Conservation and Recovery Act, and EPA have come to recognize the value of treatment and other alternative technologies.

The primary effect of this amendment would be to reduce the proliferation of sites requiring monitoring in perpetuity (by consolidating wastes from many sites into one larger and closely monitored facility), by recognizing the value of permanent off-site remedies, such as treatment.

SECTION 105

National Contingency Plan (NCP)

This amendment would (1) eliminate the requirement that the NCP include at least 400 facilities, and (2) clarify that States are allowed only one highest priority designation for the life of the list.

The deletion of the phrase "at least 400 facilities" would allow the Agency to select and place on the National Priorities List, only those facilities which present "the greatest danger to public health or welfare or the environment."

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The second part of the amendment would be a Congressional ratification of EPA's present policy which is to permit the States to make only one highest priority designation. This policy is reflected in the most recent proposed revisions to the NCP.

These amendments allow the President to effectively limit the NPL to only those facilities which pose significant problems to public health or the environment as determined through Agency regulation.

SECTION 106

Cooperative Agreements

The amendment would explicitly permit contracts and cooperative agreements to cover more than one facility, as is current EPA policy, and clarifies and confirms that response includes enforcement activities associated with a remedial or removal action. The objective of the amendment is to facilitate State response activities by permitting States to enter into agreements covering more than one site, and by providing Fund money for response actions, including enforcement activities.

The primary effect of the amendment would be to increase State participation in response and enforcement activities. This would increase the overall pace and effectiveness of the Superfund program.

SECTION 107

Publicly Operated Facilities

Section 104(c)(3) of CERCLA requires States to pay at least 50 percent of response costs for hazardous substance releases from facilities owned by the State or political subdivision thereof at the time the release occurred.

The amendment would change the 50 percent State cost share to 75 percent and impose the 75 percent or greater cost-share only at those facilities operated directly or indirectly by the State or political subdivision. The test for imposing the 75 percent or greater cost-share would be related to operation rather than ownership of the facility at the time of disposal of hazardous substances. The cost-share under this amendment would apply to sites owned and operated by the State; sites owned by the State and operated by a private party under a contract or lease with the State; and sites

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owned by a private party but operated by the State. The objective of the amendment is to impose the cost-share on States only in those cases where the State is involved in the operation of the facility, either directly or indirectly.

This amendment would also clarify that for purposes of this amendment only that the term facility will not include navigable waters or the beds underlying those waters, and thus a 75 percent cost share would not be imposed on States for response actions at such facilities.

SECTION 108

Siting of Hazardous Waste Facilities

Section 104(c)(3) of CERCLA requires that States assure the availability of hazardous waste disposal facilities for off-site remedial actions that are in compliance with subtitle C of RCRA. States are not, however, required to nor provided incentives for creating or expanding existing capacity for managing wastes, or otherwise provide for future treatment and disposal of hazardous wastes. In order to maintain an aggressive Superfund program, it is essential to ensure that States have adequate waste disposal capabilities.

This amendment would provide initiatives to States to create and expand capacity for managing wastes within the State by prohibiting the use of Fund money for response actions in those States that do not assure the availability of hazardous waste disposal capacity sufficient to handle that State's needs during a period of time to be specified by regulation. The amendment would be effective two years after enactment.

There would be limited exceptions to this prohibition. First, the amendment would permit Fund expenditures for alternative drinking water or for temporary relocation of affected individuals from their homes for up to one year. Second, Fund money could be used to finance a response action in a State that does not provide the above assurance if the President determines that a major public health or environmental emergency exists.

Any response action taken where the State fails to assure the availability of sufficient offsite capacity would be subject to a higher cost share.

The amendment would also require States to pay any additional costs associated with transporting wastes outside the State's boundaries (or outside the region, if the State has entered into a regional agreement for hazardous waste treatment and disposal) in addition to the cost of the remedy. This clause would be effective upon enactment.

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The objective of the amendment is to create an economic incentive for States to expand existing or create new long-term in-state capacity to manage hazardous wastes.

SECTION 109

Community Involvement

CERCLA does not presently address the role of community involvement in response actions. Existing federal policy does, however, provide for an active community role as expressed in existing program guidance and the proposed revisions to the National Contingency Plan.

This amendment would require public notification and an opportunity for public comment on the proposed action. The primary objective of the amendment is to ensure community involvement in remedial actions taken pursuant to this Act, including Fund-financed and enforcement actions.

Because the President has already incorporated the requirements set forth in this amendment in operating guidance, the amendment itself would not impose new responsibilities on the federal government.

The amendment confirms the President's commitment to community involvement in the Superfund program.

SECTION 110

Health Related Authorities

Section 104(i) of CERCLA establishes the Agency for Toxic Substances and Disease Registry (ATSDR). ATSDR, in cooperation with EPA and other Federal agencies, is authorized to implement the health related authorities of the Act. These authorities include the establishment and maintenance of: a national registry of diseases and illnesses associated with and persons exposed to hazardous substances, and a data base on the health effects of hazardous substances. CERCLA does not clearly define specific roles and responsibilities of ATSDR and EPA in implementing these and other health related authorities.

The amendment would clarify that the primary purpose of health related activities is to support response actions through health assessments, consultations, and other technical assistance relating to the health effects of exposure to hazardous substances, and to improve the ability to render future public health recommendations through expanding the existing body of scientific knowledge.

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In addition, the amendment would clarify existing roles and responsibilities of ATSDR and EPA in conducting various health related activities. Specifically, the amendment would authorize EPA as well as State and local officials to request that ATSDR provide health consultations, assessments, and other assistance to determine the health effects of exposure to hazardous substances. ATSDR may provide such assistance. The President would also be authorized to conduct exposure and risk assessments at sites where a release has occurred.

The amendment would not significantly affect current health related activities but it merely provides a statutory basis for current roles and responsibilities undertaken by ATSDR and EPA.

SECTION 111

Compliance with Other Environmental Laws

This amendment would authorize the President to specify in the National Contingency Plan (NCP) the extent to which remedial and removal actions selected under section 104 or selected under section 106 should comply with applicable or relevant standards and criteria established under other Federal, State or local environmental and public health laws. The amendment would specify the factors the President must consider in making this determination; these include: the level of health or environmental protection provided by the standard; the technical feasibility of achieving the standard; the interim or permanent nature of the response; the need for expedient action; and the need to preserve funds to respond to other respond to other releases.

The objective of the amendment is to clarify and confirm the President's authority to determine when response actions should comply with other Federal, State, or local laws, which is set forth in existing EPA policy. This amendment confirms that because of the unique statutory provisions of CERCLA, and requirements for response action that strict compliance with other statutory provisions is often not appropriate or necessary.

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SECTION 112Actions Under the National Contingency Plan

Section 107(d) of CERCLA exempts persons from liability for damages resulting from actions taken or omitted in responding to hazardous substance releases.

This amendment would add that persons (e.g., EPA contractors and others) conducting response actions in accordance with the NCP or at the direction of an on-scene coordinator are also exempt from liability for future response costs. This means that, for example, contractors would not be held liable for additional response costs at a site if another response action is taken at a site where the contractor already conducted a previous action (if a second response action was taken because the first response was not sufficient to address the problem), unless the original action was negligent or intentionally misconducted.

The primary effect of the amendment would be to limit contractor liability for future response costs. The amendment would not affect third party liability claims. Nor would the amendment affect the liability of persons liable or potentially liable under section 107(a) who undertake a response action under this act.

Section 113Natural Resource Damage Claims

The amendment would clarify existing language about the responsibilities of Federal and State natural resources trustees. In general, the Federal or State trustee would perform assessments of damage to resources under its jurisdiction, except that Federal trustees may perform assessments on behalf of States and may be reimbursed by States for performing the assessments. Neither Federal nor State trustees would be required to use the damage assessment regulations being prepared by the Department of the Interior, but if they used the Department of the Interior regulation the assessment would be entitled to a presumption of validity.

The amendment would also eliminate use of the Fund to pay trustees for damage to natural resources. Accordingly, all references to natural resource damage claims against the Fund would be deleted from the Act. The ability of Federal and State trustees to recover damages from responsible parties under section 107 would not diminished.

Finally, Federal agencies with custody and accountability for specific Federal facilities would be the sole trustee of natural resources on, under, or above such facilities for purposes of CERCLA.

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SECTION 114Response Claims

Section 111 of CERCLA authorizes parties who conduct response actions to assert claims against the Fund to recover necessary response costs incurred in carrying out the National Contingency Plan. The procedures to be followed in presenting and processing these claims against the Fund are set forth in section 112. This amendment would clarify and streamline the process for response claims.

The amendment would make the following changes:

- o Clarify authority to preauthorize response claims;
- o Eliminate provisions for negotiations with responsible parties;
- o Substitute an administrative hearing process for claims adjustments and arbitration; and
- o Clarify time frames for review of claims.

The availability of response claims can expedite private party cleanup. Following preauthorization for all or portions of the cleanup, private parties can promptly conduct cleanup action, and bring claims to the Fund when the response action is completed.

CERCLA currently prescribes five steps at a minimum in the process from initial presentation of the claim to the responsible party to final payment of an award. Where administrative review and judicial appeal are involved the process may take as many as eight steps before the claimant receives final payment of an award.

The amendments to this section would streamline the claims procedure. First, section 111 would be amended to clarify the authority of the Agency to preauthorize response claims. Preauthorization can be used to assure that response actions are conducted properly, and that they are limited to available funds.

Second, the provisions for negotiations with responsible parties prior to payment of claims would be eliminated. Such negotiations as are needed would be conducted prior to preauthorization.

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Third, an administrative hearing process would be substituted for the arbitration procedure presently provided for in the statute. The arbitration procedure is a vestige of certain economic damage claims which were not enacted in 1980. In that the claims procedures will involve only reimbursement of costs, there is no reason for claims to be arbitrated.

Response costs, are not particularly appropriate for consideration by a panel of arbitrators.

Fourth, certain ambiguities in the timeframes for Presidential action would be clarified.

SECTION 115

Indian Tribes

CERCLA is presently silent regarding the status of tribal governments and Indian lands. Current CERCLA policy, however, recognizes tribal governments as independent sovereigns with authority and responsibility over reservations roughly analogous to that of State governments. This means that tribal governments are subject to various notification, consultation, health related activity, and financial and disposal capacity assurance requirements.

The proposed amendment would clarify the role of States, Indian tribes, and the Federal government for facilities on Indian lands. It defines Indian lands to include only those where there is some type of trust responsibility or restriction against alienation.

Subsection (a) would add two new definitions, "Indian tribe" and "Indian lands." Both definitions are tied to the United States trust responsibility. Not all Federally recognized Indian tribes would be included in the CERCLA definition; only those tribes for which land is held in trust.

Section (b) would set forth the procedure for remedial actions on Indian lands. Indian tribes would be required to provide the assurances specified in section 104(c)(3) for sites on Indian lands. If the Secretary of the Interior finds that a tribe cannot provide these assurances, the Department of the Interior may provide them on behalf of the tribe. States would not be required to provide assurance for sites wholly on Indian lands.

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The amendment authorizes the President to enter into agreements with Indian tribes to carry out response actions under section 104 and the National Contingency Plan and to enforce these agreements. Indian tribes would be reimbursed from the Fund for reasonable response costs.

Also, Indian tribes would be notified by the National Response Center of releases that affect Indian lands.

SECTION 116

Preemption

Section 114(c) of CERCLA preempts States from requiring persons to contribute to any fund designed to provide compensation for claims for response costs or damages which may be compensated under CERCLA. The provision is not clear and it has been argued that the intent of this provision is to preempt States from imposing State taxes to finance certain CERCLA and non-CERCLA action.

The amendment would delete the section which preempts States from imposing taxes for purposes already covered by CERCLA. The objective of the amendment is to ensure that States may impose taxes to meet Superfund cost-share requirements, and to foster State cleanup at sites not covered by CERCLA.

The primary effect of the amendment would be to remove a potential barrier to the creation of State superfund programs. The amendment may result in an increase in the number and pace of hazardous substance response actions undertaken or partially funded by States since States would be able to raise funds to assist such hazardous substance response.

SECTION 117

State Cost-Share

Section 104(c)(3)(C)(i) of CERCLA requires States to pay ten percent of costs for remedial actions at privately owned facilities.

This amendment would alter the existing Federal-State cost-share to require States to pay 20 percent of the remedial action costs at privately owned sites. The cost-share for State or political subdivision sites would be 75 percent (see section 106 of this Act).

The objective of this amendment is to reduce the existing burden on the Federal government for financing remedial response actions by requiring the States to pay a larger share of costs at privately owned sites. The amendment is consistent with an overall goal of these amendments in increasing the role of the States in conducting response actions.

TITLE II -- PROVISIONS RELATING PRIMARILY TO ENFORCEMENTSECTION 201Civil Penalties for Non-Reporting

Section 103(a) of CERCLA requires any person in charge of a vessel or facility to notify the National Response Center as soon as the person in charge has knowledge of any release of a hazardous substance in an amount that equals or exceeds the reportable quantity established under section 102. These notifications serve as one basis for the Federal government to determine whether response action is appropriate for the release.

The existing statute provides only criminal penalties for failure to report. This amendment would increase the criminal penalty to \$25,000 and provide additional enforcement flexibility by allowing the imposition of a civil penalty of up to \$10,000 per violation.

The amendment would enable the Administrator to assess civil penalties aggregating less than \$25,000 for such violations; penalties aggregating more than \$25,000 may be recovered by the Attorney General through a civil action.

Civil penalties for violations of notification requirements have several advantages:

First, civil penalties may be imposed in situations where the violations do not merit the sanctions associated with criminal violations.

Second, when the Federal government takes an enforcement action to compel private party cleanup action for such a release, the Federal government may now also seek penalties for violations of the notification provision in the cleanup enforcement action.

SECTION 202Contribution and Parties to Litigation

This amendment would change section 107 of CERCLA to provide a greater degree of finality to settlements reached with responsible parties, and to expedite private party cleanup by simplifying the litigation process in imminent hazard and cost recovery actions.

This amendment would clarify and confirm existing law governing liability of potentially responsible parties in three respects:

- parties found liable under section 106 or 107 would have a right of contribution, allowing them to sue other liable or potentially liable parties to recover a portion of the costs paid;
- parties who reach a judicially approved good faith settlement with the government would not be liable for the contribution claims of other liable parties; and
- where a civil or administrative action is underway, contribution actions could be brought only after a judgment is entered or a settlement in good faith is reached.

The first provision should help to encourage private party settlements and cleanups. Parties who settle or who pay judgments as a result of litigation, could attempt to recover some portion of their loss in subsequent contribution litigation from parties who were not sued in the enforcement action. Private parties may be more willing to assume the financial responsibility for cleanup if they are assured that they can seek contribution from others.

The second provision would help bring an increased measure of finality to settlements. Responsible parties who have entered into a judicially approved good faith settlement under the Act would be protected from paying any additional portion of costs to other responsible parties in a contribution action.

The third provision would allow more expeditious management of litigation. Hazardous waste sites often involve dozens or even hundreds of potentially responsible parties with differing types and degrees of involvement in the facility. While the government may sue all potentially responsible parties, it need not sue all these parties. It may instead sue a limited number of parties to secure complete cleanup or all costs of cleanup under the theory of joint and several liability. In some instances these parties have in turn sued other potentially responsible parties in the same judicial action. In several cases this has resulted in massive and potentially unmanageable litigation.

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The amendment would clarify that if an enforcement action is underway, claims for contribution or indemnification could not be brought until a judgment or settlement is reached. This change would allow the government to limit the number of parties in its actions, so that litigation could be conducted in a more efficient and expeditious fashion.

SECTION 203

Access and Information Gathering

Section 104(e) of CERCLA clearly authorizes the Agency to request information concerning the treatment, storage, disposal or handling of hazardous substances, and to enter premises where hazardous substances were generated, stored, treated, disposed, or transported. This amendment would clarify and confirm the President's right to access and information concerning the release or threatened release of hazardous substances by making explicit the original intent of Congress when CERCLA was enacted in 1980.

Currently, there is no explicit authority to enforce information requests under CERCLA. In addition, there is no explicit language to compel parties to provide access to the site or adjacent areas. Access to the site is obviously needed to conduct a response action. The President may also need access to adjacent areas to conduct sampling or move equipment.

While landowners generally will provide access voluntarily, explicit statutory authority would encourage private parties to consent to access and information requests, and would provide explicit mechanisms for the President to obtain access and information when such requests are reasonable but refused.

This amendment would also establish procedures for the President to issue orders for access and information. The President would notify potential recipients of orders and provide an opportunity for consultation. The President could also seek to have the Federal courts enjoin interference with access and direct private parties to comply with orders. This provision would enable the government to seek judicial relief so that necessary response actions would not be unduly delayed.

SECTION 204

Administrative Orders for Section 104(b) Actions

CERCLA section 104(b) currently authorizes the President to conduct a variety of investigations, studies, and information gathering activities. Under this section, remedial investigations and feasibility studies (RI/FSs) are performed to serve as the basis for choosing the appropriate extent of remedy.

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In some circumstances, it may be appropriate to allow potentially responsible parties to conduct RI/FSs or other investigations or studies. This approach would free up government resources to address other sites, and would increase the likelihood that private parties would assume responsibilities for cleanup of the site. Such private-party RI/FSs are most effective when they are performed pursuant to an administrative order that clearly sets out the responsibilities of the private parties.

This amendment to CERCLA would provide for administrative orders on consent without the need for any findings by the President with regard to potential hazard at the facility, to allow the planning and investigative stages of response actions to proceed more expeditiously. The order would be enforceable in district court, and the court could issue a civil penalty for noncompliance.

It should be noted that EPA retains the authority to choose the appropriate remedy, based on a Record of Decision developed by EPA. This amendment would not authorize orders on consent for actual cleanup activities under section 104.

This section would also include a technical amendment to section 107 of CERCLA. Section 107 currently provides for treble damages from any person who is liable for a release or threat of release and who fails without sufficient cause to comply with an order under section 104. The penalties established for violations of administrative orders for access under section 203 of this Act, and orders on consent for private party studies and investigations, are sufficient incentives to assure compliance. Accordingly, the reference to treble damages for violations of section 104 orders would be removed. This would not change the President's authority to seek treble damages for violations of orders under section 106.

SECTION 205

Non-Trust Fund and Pre-Trust Fund Expenditures

This amendment would clarify and confirm that CERCLA establishes liability for costs incurred by the United States in response to a release or threatened release of a hazardous substance from a treatment, storage or disposal facility where the response was after passage of the Resource Conservation

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and Recovery Act of 1976 and the party knew or should have known of the response action. Such costs must not have been inconsistent with remedial or removal actions under CERCLA.

The United States has incurred substantial response costs in connection with responses at hazardous waste facilities occurring after enactment of RCRA that are wholly consistent with CERCLA's goals and authorities. Where the person knew or should have known of the Federal response action, but did not act to clean up the release, it is entirely appropriate and consistent with CERCLA to clarify and confirm that responsible parties are liable for such response costs.

SECTION 206

Statute of Limitations

CERCLA currently includes no explicit statute of limitations for the filing of cost recovery actions under section 107. Nevertheless, the Federal government recognizes the need for filing of cost recovery actions in a timely fashion, to assure that evidence concerning liability and response costs is fresh, to help replenish the Fund, and to provide some measure of finality to affected responsible parties. The absence of an explicit statute of limitations has also led to some uncertainty concerning whether the existence of such a statute of limitations should be assumed under Federal law.

This amendment would eliminate this uncertainty by establishing a six-year statute of limitations for the filing of cost recovery actions. The six-year statute of limitations is the same as the period established by a clear line of cases involving the parallel provisions in section 311 of the Clean Water Act. Because response actions may extend for a number of years, the government is not precluded from commencing an action for recovery of costs at any time after such costs have been incurred.

For purposes of this section, the response action is regarded as completed upon completion of any operation and maintenance activities funded by the Federal government.

In addition, this amendment would provide a three-year statute of limitations: for damage actions, running from the date of discovery of the loss; for contribution actions, running from entry of judgment or the date of settlement; and for rights subrogated pursuant to a claim paid from the Fund, from the date of payment of such claim.

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SECTION 207Pre-Enforcement Review.

The purpose of this amendment is to clarify the process for judicial review of government decisions on the appropriate extent of remedy and liability of responsible parties. This section establishes that:

- o review of all Presidential decisions concerning remedy is on the administrative record;
- o there is no pre-enforcement review of section 106 administrative orders; and
- o administrative orders are subject to judicial review once response action is completed.

(a) Record Review:

While CERCLA does not explicitly state how decisions on remedies will be judicially reviewed, the Federal government has taken the position and certain courts have suggested that review of decisions concerning remedy, like most administrative decisions, are on the basis of the administrative record. This amendment would clarify and confirm that judicial review of the response action is limited to the administrative record and that the action shall be upheld unless it is arbitrary, capricious, or otherwise not in accordance with law. Reliance on an administrative record helps assure that the basis for the response decision is clearly articulated and open to the scrutiny by the public and responsible parties.

Limiting judicial review of response actions to the administrative record also expedites the process of review and ensures that the reviewing court's attention is focused on the information and criteria used in selecting the remedy.

(b) Pre-Enforcement Review:

Section 106 orders may be subject to judicial review at the time the government acts to enforce the order and collect penalties for non-compliance. This amendment would clarify and confirm that orders are not subject to judicial review prior to that time.

The clarification reflects the fact that pre-enforcement review would be a significant obstacle to the use of administrative orders. It is likely that pre-enforcement review would lead to considerable delay in providing cleanups, increase response costs and discourage settlements and voluntary cleanups.

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(c) Review of Orders:

The changes discussed above clarify and confirm the existing process. Section 208(c) would amend section 106 to establish new procedures for reimbursement of certain response costs and to provide for judicial review of administrative orders once the response action required by the order is completed.

Under the amendment, responsible parties can request reimbursement from the Fund for costs incurred in responding to an order. If the President refuses to grant all or part of a petition for reimbursement, responsible parties may file an action in district court seeking reimbursement. Responsible parties can obtain reimbursement if they can show that:

- o they are not liable, and that the costs which they incurred in responding to the order were reasonable; or
- o the response action ordered by the President was arbitrary and capricious or otherwise not in accordance with law.

This provision is intended to foster compliance with orders and expeditious cleanup, allowing potentially responsible parties to preserve their positions concerning liability and the appropriateness of the response action, in circumstances where they agree to undertake the cleanup. Under the record review provisions discussed above, responsible parties would also have opportunities for input into the decision making process for choosing the appropriate response action.

SECTION 208Nationwide Service of Process

Rule 4(f) of the Federal Rules of Civil Procedure limits effective service of process to the territorial limits of the State in which the district court is held, unless a Federal statute provides otherwise. Difficulties have arisen in obtaining personal jurisdiction over certain defendants in actions by the United States under CERCLA. This amendment would remove these difficulties by providing that the United States may serve a defendant in any district where he resides, transacts business, or may otherwise be found.

SECTION 209Abatement Action

This amendment would delete the references to "welfare" in section 106 of CERCLA. Consequently, enforcement or abatement action could only be taken when the President determines that there may be an imminent and substantial endangerment

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to the public health or the environment because of an actual or threatened release of a hazardous substance from a facility. This amendment focuses CERCLA enforcement efforts on public health and the environment.

SECTION 210

Federal Lien

This amendment would enable the United States to recover at least some of its response costs through an in rem action against the real property that is the subject of the response action. Such protection for the United States would also enable it to recover the increase in land value resulting from the response action, thus preventing unjust enrichment of the property owner.

The amendment would provide that all costs and damages for which a person is liable to the United States under section 107(a) shall be a lien on all real property affected by the response action. The lien would arise at the time the United States first incurs response costs, but would not be perfected as against purchasers, security interest holders, and judgment lien creditors (all as defined in the tax lien statute, 26 U.S.C. §6321 et seq.) until notice of the lien has been recorded or filed. The notice provision would not apply with respect to any person who knew or should have known that the United States had incurred response costs.

SECTION 211

Penalties

This amendment would increase criminal penalties in section 103(d)(2) of CERCLA for destruction of records from \$20,000 to \$25,000. Civil penalties under section 106(b) of CERCLA for violation of a 106 order would be increased from \$5,000 to \$10,000 per day. These increases in penalties are intended to significantly strengthen existing incentives for compliance with CERCLA provisions.

SECTION 212

Federal Agency Settlement

The existing section 107(g) of CERCLA makes Federal agencies liable for response costs and natural resource damages from releases of hazardous substances in the same manner as a private entity. This may be the basis for legitimate claims which should be paid by the United States without resort to litigation. However, CERCLA currently neither confers authority nor specifies procedures for administrative payment of such claims.

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This amendment provides procedures for administrative settlement of CERCLA claims. The language is modeled closely after a similar provision in the Federal Tort Claims Act, 10 U.S.C. § 2672. Under the amendment, Federal agencies are authorized to settle claims for \$25,000 or less in accordance with Justice Department procedures, and to arrive at tentative settlements for Justice Department approval for amounts over \$25,000.

SECTION 213

Foreign Vessel Liability

This amendment would delete from CERCLA a clause that had the unintended effect of excluding from liability under section 107 all foreign vessels not under United States jurisdiction, even when such vessels release hazardous substances in areas otherwise subject to United States jurisdiction.

TITLE III -- AMENDMENTS TO THE INTERNAL REVENUE CODE OF 1954

Title II of CERCLA amended the Internal Revenue Code of 1954, establishing the Hazardous Substance Response Trust Fund (Fund). The Fund is comprised primarily of revenue derived from excise taxes on certain petrochemicals and inorganic raw materials, as well as on domestic crude oil and imported petroleum products (87%) and appropriations from the General Fund (12%). Revenues in the Fund are used to finance Superfund response and support activities.

The present CERCLA tax scheme is referred to as a "feed-stock tax" because it imposes a tax on the basic chemical building blocks of chemical products. The hazardous substances and wastes associated with the problems addressed by CERCLA are byproducts of production processes that use these raw materials.

The Fund was designed to contain approximately \$1.6 billion from FY 1981 through FY 1985. Current authorization to impose taxes to finance the program expires September 30, 1985. This amendment is needed to authorize the imposition of taxes to finance Superfund response actions over the next five years.

The tax structure set forth in these amendments has been designed to meet the following objectives:

- ° to provide a stable and predictable source of revenue;
- ° to broaden the tax base from which contributions are received;
- ° to minimize adverse economic impacts on taxed industries; and
- ° to focus the tax on the type of industries and practices that have caused the problems that are addressed by Superfund.

The amendment would authorize a Fund of approximately \$1 billion per year, or roughly \$5.3 billion from FY 1986 through FY 1990. This represents the level of funding that can be effectively managed over the next five years and raised without significant adverse affects on tax paying firms.

The amendment would establish a Fund with revenue derived primarily from three sources.

The first source of revenue would be derived from a feedstock tax. This tax would be imposed on crude oil and petroleum products as well as the 42 chemical feedstocks taxed under the present statute. The tax rates imposed on these feedstocks would remain the same as the rates established in 1980: approximately \$4.87 per ton for petrochemical feedstocks, approximately \$4.45 per ton for inorganic raw

materials (with adjustments for elemental equivalency), and 0.79 cents per barrel for crude oil and petroleum products. This feedstock tax would maintain the current CERCLA exemptions on methane or butane used as fuel, substances used in the production of fertilizers, sulfuric acid produced as a by-product of air pollution control, substances derived from coal, and taxable chemicals made from previously taxed taxable chemicals. The feedstock tax has been designed to raise approximately \$300 million per year.

The second source of revenue would be derived from a waste-management tax. This tax would be imposed on the receipt of hazardous wastes at a qualified treatment, storage, or disposal unit (i.e. a unit permitted under the Resource Conservation and Recovery Act (RCRA)), as well as on hazardous wastes disposed of in the ocean or exported from the United States. The tax liability would be imposed on the owner or operator of a qualified hazardous waste management facility, the owner or operator of a vessel that disposes of wastes into or over the ocean, and the exporter of hazardous wastes.

The tax rates imposed under the waste-management tax would increase each year of the tax, and would be higher for landfills, surface impoundments, waste piles, and land treatment units. The following amount per wet-weight ton would be imposed:

<u>Year</u>	<u>Rate *</u>
FY 86	\$ 9.80 per ton
FY 87	\$10.09
FY 88	\$11.13
FY 89	\$13.48
FY 90	\$16.32

For waste exported from the U.S., disposed into or over the ocean, or received at a qualified hazardous waste management unit other than specified above, the following amount per wet-weight ton would be imposed:

<u>Year</u>	<u>Rate *</u>
FY 86	\$ 2.61 per ton
FY 87	\$ 2.68
FY 88	\$ 2.96
FY 89	\$ 3.59
FY 90	\$ 4.37

* Beginning in 1987, the tax rates would be adjusted annually to compensate for any shortfalls in projected revenues. If necessary to meet revenue targets, the tax may be extended from October 1, 1990, through March 31, 1991, at the same rates applicable in Fiscal Year 1990.

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Wastes managed in units not subject to permits under subtitle C of RCRA (e.g. wastes stored in tanks and containers for less than 90 days), wastes from CERCLA response actions, and wastes generated by Federal facilities would not be subject to the waste-management tax. Additionally, a credit would be given for taxes already paid on wastes that are transferred from one taxable unit to another. If the units involved in the transfer have different applicable tax rates, the credit would be based on the lower rate.

The waste-management tax has been designed to raise approximately \$600 million per year.

The third source of revenue would be derived from interest on Superfund investments, fines, costs recovered from parties responsible for response actions financed from the Fund, and intra-fund transfers. This portion of the Fund would raise approximately \$100 million per year.

TITLE IV -- MISCELLANEOUS PROVISIONSSECTION 401Applicability of Amendments

This amendment would add a new section to CERCLA providing that the amendments relating to section 104(a) and (b), which limit response authority under CERCLA, would not affect sites listed on the NPL prior to January 1, 1985.

The effect of the amendment would be that sites listed as final on the NPL prior to January 1, 1985 would not be affected by the amendments to sections 104(a) and (b). Sites which remain proposed for inclusion on the NPL may be affected by the amendments. In other words, sites which remain proposed that do not pertain to releases from uncontrolled hazardous waste sites or are specifically excluded from Superfund response (e.g., mining wastes covered by SMCRA or sites contaminated solely as a result of the lawful application of pesticides) would not be eligible for Superfund response, because they did not become final NPL sites by January 1, 1985.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAR 26 1985

OFFICE OF
GENERAL COUNSEL

Honorable George J. Mitchell
United States Senate
Washington, D.C. 20510

Dear Senator Mitchell:

This is in response to your question concerning the legal authority under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund) for the "umbrella" agreement (Enclosure I) recently entered into between the Environmental Protection Agency (EPA) and Clean Sites, Inc. (CSI). Under this agreement, EPA will consider indemnifying CSI from Superfund for liability arising from CSI's efforts to promote cleanup at individual hazardous waste sites.

In November 1984, this office set out the legal basis for CSI undertaking response actions under CERCLA in a document entitled "Justification for CSI Preauthorization" (Enclosure II). As stated in the Justification, Section 105(9) of CERCLA provides that the National Contingency Plan (NCP) (the regulation under which the CERCLA program is implemented) is to specify roles for private organizations and entities in responding to releases of hazardous substances. Under section 300.25(d) of the NCP, private parties may undertake response actions and be reimbursed for their costs if the actions are approved in advance by EPA and carried out in conformity with the NCP. Section 111(a)(2) of CERCLA authorizes payment from Superfund of claims for necessary response costs incurred by private parties.

CSI is a non-profit corporation with the exclusive objective of facilitating voluntary cleanup of hazardous waste sites and is therefore a private party within the meaning of the statute and the regulations. The types of activities in which CSI will be engaged are response actions under CERCLA.

As we said, Section 111(a)(2) authorizes the reimbursement of "necessary" response costs. A necessary cost is one that is essential to or directly contributes to the accomplishing of the

purposes for which funds were appropriated. We believe that the cost of indemnifying CSI for liability to third parties under the umbrella agreement is a necessary response cost. No other costs incurred by CSI are payable under the terms of the umbrella agreement.

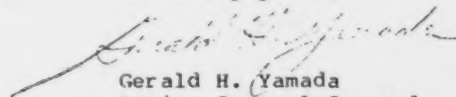
CSI's Board of Directors, officers and employees may be subject to personal liabilities from third party claims arising from their advisory activities at Superfund sites. EPA has determined that CSI's activities will substantially contribute to the accomplishment of the purposes of CERCLA and that EPA's indemnification is necessary for CSI's participation. (See Enclosure II).

The agreement with CSI is not our first use of Superfund for indemnification. EPA decided in 1981 to indemnify EPA contractors engaged in remedial investigations and feasibility studies at Superfund sites for third party liabilities arising from their actions because such payments can reasonably be considered a necessary expense of such contracts. The basis for that decision was that in many instances adequate competition for such contracts could not be obtained absent such indemnification and since EPA pays the insurance costs of these contractors, the actual costs of insurance would likely be greater than the potential cost of indemnification.

We have not yet agreed, however, to indemnify CSI with respect to any particular site. That decision will be made only after a full consideration of the need for indemnification at each site. In addition, the indemnification would be limited to \$5 million per site, and \$10 million per year. CSI would be required to obtain any available insurance or other indemnification; EPA's indemnification would be of last resort. Finally, the indemnification to be provided CSI would be limited in accordance with the requirements of the Anti-Deficiency Act, 31 U.S.C. §1341, which prohibits contingent liabilities that could exceed an agency's appropriations.

If I may be of further assistance in this matter, please contact me.

Sincerely yours,



Gerald H. Yamada
Acting General Counsel

Enclosures

Enclosure I

"Umbrella Agreement"--Clean Sites Inc.

WHEREAS, the United States Environmental Protection Agency ("EPA"), under the Comprehensive Environmental Response, Compensation, and Liability Act (the "Act"), 42 U.S.C. §§9601 et seq., and Executive Order 12316, is charged with the responsibility of ensuring the cleanup of sites at which there has been a release or threatened release of a hazardous substance into the environment (hereinafter, "sites"), as these terms are defined under the Act;

WHEREAS, EPA desires to expedite the cleanup of sites listed on the National Priorities List ("NPL");

WHEREAS, the Act contemplates a role for private organizations in the cleanup of sites;

WHEREAS, Clean Sites, Inc. ("CSI") was organized and chartered for the sole purpose of facilitating and expediting the cleanup of sites;

WHEREAS, CSI's principal objective is to encourage, arrange or facilitate the cleanup of sites that EPA might not be able to address in the near term;

WHEREAS, CSI will select only officers and employees who possess the scientific, technical, business, and other skills necessary to facilitate the cleanup of sites by potentially responsible parties;

WHEREAS, CSI is a non-partisan organization, whose structure and leadership have been selected with a view to ensure that CSI's activities will be performed evenhandedly, assuring that the full range of public and private interests will be taken into account;

WHEREAS, CSI is a not-for-profit charitable organization registered with the Internal Revenue Service under section 501(c)(3) of the Internal Revenue Code;

WHEREAS, the funding for CSI's advisory activities at particular sites for which CSI may seek preauthorization to submit a claim for indemnification from the Hazardous Substance Response Trust Fund (the "Fund") will be independent of any potentially responsible parties associated with such sites (although CSI does engage in general fund raising from industrial firms and may (without remuneration) transmit funds from potentially responsible parties to third parties who furnish management services with respect to the cleanup of particular sites);

WHEREAS, CSI's by-laws provide assurance that CSI's decisionmaking process will be free from conflicts of interest;

WHEREAS, EPA will make available to the public all factual documents considered by EPA in its decisionmaking process to select a remedy for the site cleanup;

WHEREAS, CSI will make available to the public the factual information reasonably necessary for an informed and independent

evaluation of cleanup plans and implementation;

WHEREAS, CSI and its directors, officers, and employees may be subject to third party liability claims arising from its activity, which claims are not fully covered by insurance or other indemnification;

WHEREAS, the protection of CSI and its directors, officers, and employees from such third party claims is necessary to ensure the performance of CSI's services, and indemnification from the Hazardous Substance Response Trust Fund (the "Fund") is a necessary source of such protection;

WHEREAS, any site-specific agreement to preauthorize CSI or covered individuals to submit to the Fund a claim for indemnification shall contain, at a minimum, the conditions set forth in the model site-specific agreement contained in Appendix A hereto;

NOW THEREFORE IT IS AGREED:

1. CSI will use its best efforts to facilitate cleanups of sites by potentially responsible parties;
2. Except as provided in paragraph 4, EPA will consider, with respect to individual sites listed on the NPL, requests by CSI and/or its directors, officers, and employees for preauthorization to submit claims to the Fund under section 112 of the Act for uncompensated costs incurred by CSI and/or its directors, officers and employees, for liability to third parties arising from actions taken by CSI (including failure to act) with respect to that site, from the date of preauthorization with

respect to that site, to and including the date of certification of the remedial investigation/feasibility study for that site or the date on which CSI terminated its activities with respect to that site, whichever occurred first;

3. CSI shall notify EPA in writing promptly (in no event later than 10 days) upon the termination of CSI's activities with respect to a particular site at which preauthorization was granted;

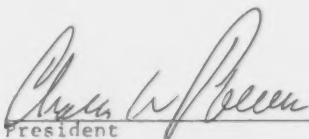
4. No claims for indemnification may be submitted to the Fund under this Agreement for liability to potentially responsible parties with respect to a particular site unless the responsible party or parties did not enter into an indemnification agreement with CSI and CSI promptly notified EPA, in writing (in no event later than 5 business days after an indemnification agreement was executed) of the identity of each potentially responsible party with which CSI entered into an indemnification agreement with respect to that particular site;

5. With respect to sites at which CSI has obtained preauthorization from EPA, CSI agrees:

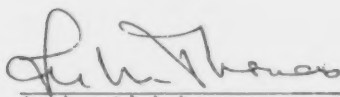
- a. to use its best efforts to expedite a remedial investigation/feasibility study ("RI/FS") that is consistent with the National Contingency Plan ("NCP"), 40 CFR Part 300, and any EPA guidance furnished to CSI;
- b. if CSI has reviewed the RI/FS or any draft of the RI/FS, to determine whether the RI/FS or the draft reviewed by CSI, as applicable, is consistent with the NCP and any EPA

guidance furnished to CSI, and certify its findings to EPA;
c. in cases where a remedial action is undertaken, if CSI
has reviewed the remedial action and if CSI receives
adequate indemnification from the potentially responsible
parties, to determine whether those aspects of the remedial
action reviewed by CSI are consistent with the selected
remedy and certify its findings to EPA.

Agreed to this 7th day of February, 1985.



President
Clean Sites, Inc.



Acting Administrator
U.S. Environmental Protection
Agency

MODEL SITE SPECIFIC PREAUTHORIZATION OF CLAIM

Pursuant to section 111(a)(2) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 et. seq., and section 300.25(d) of the National Contingency Plan (NCP), 40 C.F.R. Part 300, the Environmental Protection Agency (EPA) hereby authorizes Clean Sites, Inc. (CSI) to submit claims to the Hazardous Substance Response Trust Fund (the Fund) in accordance with section 112 of CERCLA for third party liabilities not fully insured or otherwise indemnified arising from CSI response actions at _____, ("the Site"). This authorization is subject to the following terms and conditions.

A. Coverage

CSI may submit claims only for liabilities to one or more third parties incurred by CSI or by members of the CSI Board of Directors, CSI officers, CSI employees or [identify other covered individuals] ("covered individuals") while acting within the scope of their employment and/or duties in carrying out the response action authorized in Paragraph B. This authorization does not extend to any other parties.

B. Authorized Response

1. CSI and/or any of the covered individuals referred to in Paragraph A may submit claims for liabilities to a third party arising from activities (including failure to act) that (a) relate to the Site, and (b) occurred during the period from the date of this authorization to and including the date of certification (or such recertification as may be requested by EPA) of

APPENDIX A

the remedial investigation/feasibility study (RI/FS), as provided in paragraph A.3, or the date of termination of CSI activities with respect to the Site, whichever is earlier. CSI and covered individuals are not authorized to submit claims for liability to a third party arising from activities of CSI or a covered individual acting within the scope of his duties to CSI if such activities are connected with remedial design, remedial construction, or operation and maintenance at the Site, except to the extent that such claims are based on activities which occurred prior to the certification of the RI/FS.

2. CSI may not submit claims for third party liabilities arising from response action for which CSI received compensation from the potentially responsible parties associated with the Site. CSI's receipt of compensation does not include general fund raising from industrial firms or its receipt and transmittal (without remuneration) of funds from potentially responsible parties to third parties who furnish management services with respect to the cleanup of the Site.

3. CSI shall:

- a. use its best efforts to expedite an RI/FS of the Site that is consistent with the NCP, 40 CFR Part 300, and any EPA guidance furnished to CSI;
- b. if CSI has reviewed the RI/FS or any draft of the RI/FS relating to the Site, determine whether the RI/FS or the draft reviewed by CSI, as applicable, is consistent with the NCP and any EPA guidance furnished to CSI, and certify its findings to EPA;
- c. in cases where a remedial action is undertaken at the Site, if CSI has reviewed the remedial

action and if CSI receives adequate indemnification from the potentially responsible parties, determine whether those aspects of the remedial action reviewed by CSI are consistent with the selected remedy and certify its findings to EPA.

C. Insurance Coverage and other Indemnification

1. CSI represents that it has used its best efforts to obtain the maximum insurance coverage available at an affordable price to protect it and the covered individuals fully or partially against claims of the types subject to indemnification under this preauthorization, and to obtain indemnification for third party liabilities from potentially responsible parties where it has determined that such agreements will not create conflicts of interest and will not disrupt its efforts to coalesce the potentially responsible parties.

2. CSI further represents that it has provided to EPA copies of all effective insurance coverage and indemnification agreements relating to the Site, if any, and documentation to demonstrate to EPA's satisfaction that CSI has used its best efforts to obtain and maintain the insurance coverage and indemnification described in paragraph C.1. Such documentation shall be supplemented by submission by CSI to EPA of copies of all documents changing CSI's insurance coverage, or constituting or changing an indemnification agreement with respect to this Site; such supplements shall be provided by CSI within 30 days of CSI's receipt of the documents.

3. CSI shall continue to use its best efforts to obtain and maintain additional insurance coverage and indemnification agreements with respect to the Site.

D. Limits of Indemnification

1. CSI and covered individuals may submit claims for indemnification for liability for death, bodily injury, or loss of or damage to property of third persons arising out of CSI response activities with respect to the Site that are not fully compensated by applicable insurance coverage or otherwise (including but not limited to any indemnification made available to CSI by potentially responsible parties associated with the Site). Any indemnification by potentially responsible parties shall be applied to any uninsured third party liabilities before the indemnification provided by this preauthorization.

2. Such claims, if supported by relevant facts and law, shall be paid from the Fund in accordance with the terms and conditions of this agreement and in particular, subject to the following limitations: (a) CSI and/or covered individuals will not be paid more than a total of \$5 million from the Fund for liabilities arising from activities with respect to the Site; (b) CSI and/or covered individuals will not be paid more than a total of \$10 million from the Fund in any fiscal year; (c) payments from the Fund will not exceed appropriations available for CERCLA at the time such payments are made. Unpaid claims may be resubmitted to the Fund. This preauthorization will not be interpreted as implying that Congress will, at a later date, appropriate additional funds to meet any outstanding liabilities.

3. This preauthorization does not apply to claims for:

- a. liabilities to potentially responsible parties associated with the Site (unless the potentially responsible party or parties did not enter into

3. Liabilities for which indemnification is sought from the Fund must be represented by a final judgment or a settlement approved in writing by EPA.

4. Indemnification payments may, in EPA's discretion, be made directly to CSI or the covered individual or directly to the party or parties to whom CSI or the covered individual is liable.

5. No indemnification may be paid from the Fund unless all terms of this preauthorization have been met.

F. Exclusive Remedy

1. Submission of a claim to the Fund for third party liabilities under sections 111(a)(2) and 112 of CERCLA is CSI's exclusive remedy for such liabilities against EPA.

2. Nothing in this preauthorization shall be construed to create, either expressly or by implication, any rights or interest in any parties other than CSI and covered individuals (or their estates).

Date:

Acting Administrator
Environmental Protection Agency

Date:

President
Clean Sites, Inc.

an indemnification agreement with CSI and CSI promptly notified EPA, in writing, (in no event later than 5 business days after an indemnification agreement was executed) of the identity of each potentially responsible party with which CSI entered into an indemnification agreement with respect to the Site).

- b. liabilities that arose prior to the date of this authorization.
- c. expenses of litigation or expenses of reaching a settlement of any third party liability claims or actions (as distinct from the amount to be paid in any settlement);
- d. liabilities that arose as a result of CSI activities which were not in conformance with the authorized response actions described in Paragraph B.1;
- e. liabilities that arose as a result of the gross negligence or willful misconduct of CSI or covered individuals; or
- f. liabilities for death, bodily injury, or loss of or damage to property of a covered individual occurring within the scope of his/her employment with CSI.

E. Defense of Liability Claims and Payment from the Fund

1. CSI shall promptly notify EPA of any claim or action against it or against any covered individual which reasonably may be expected to involve indemnification from the Fund and shall provide EPA with all relevant documents regarding such claim or action.

2. EPA may, in its discretion, direct, control, or assist in the settlement or defense of any third party liability claim or action against CSI or a covered individual that may potentially involve indemnification from the Fund.

JUSTIFICATION FOR CSI PREAUTHORIZATION

Section 105(9) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund) provides that the National Contingency Plan (NCP) is to specify roles for private organizations and entities in responding to release of hazardous substances. Further, section 111(a)(2) authorizes the payment from the Hazardous Substance Response Trust Fund (the Fund) of claims for necessary response costs incurred by private parties as a result of carrying out the NCP. Response actions include studies, investigations and other information gathering activities necessary to identify the source and nature of a release, the risk posed, and the alternatives for dealing with the problem. Section 104(b). Under section 300.25(d) of the NCP, a private party that proposes to undertake a response action and to be reimbursed from the Fund must obtain EPA's prior approval of the action and must carry out the response in conformity with the NCP. The advisory action of Clean Sites, Incorporated (CSI) described hereafter, constitutes response actions within the meaning of §104(b) of CERCLA.

(CSI) has requested EPA's approval to submit claims to the Fund for uninsured third party liabilities arising from CSI response actions at uncontrolled hazardous waste sites on the National Priorities List (NPL). CSI was chartered with the goal of expediting the cleanup of such sites by the private parties that are potentially liable for the costs of response under section 107 (PRPs). CSI will facilitate this cleanup by (1) helping achieve agreement on liability faster than the current adversarial process; (2) offering a supplemental method of

assuring the public and other parties that the cleanup is adequate; and (3) in some cases, providing expert management and assistance in cleanup projects. As a result of this advisory function, CSI directors, officers and employees may be subject to personal liability for harm to third parties. CSI must use its best efforts to obtain the maximum private third party liability insurance available to it at an affordable price and to obtain indemnification from potentially responsible parties. CSI shall provide EPA with copies of its insurance and indemnification coverage and any documents reflecting changes in such coverage. CSI shall also document, to EPA's satisfaction, its efforts to obtain additional insurance and indemnification coverage. There remains, however, potential uninsured liabilities.

EPA has agreed, for the reasons described below, to preauthorize CSI to submit claims to the Fund for third party liabilities not fully insured or otherwise indemnified, subject to the terms and conditions set out in site-specific pre-authorization agreements.

1. CSI will contribute substantially to the achievement of CERCLA objectives.

At the time that CERCLA was enacted, it was estimated that there were nearly 6000 hazardous waste sites in the United States which needed to be investigated to determine whether a cleanup was required. EPA is now aware of some 18,000 potentially hazardous sites that require further investigation. The NPL is comprised of those sites that have been found to present a chronic or long-term threat and therefore require remedial

action. As of September 21, 1984, there were 538 sites on the NPL; an additional 248 sites have been proposed for inclusion on the NPL. Eventually, the NPL may total between 1400 and 2200 sites. In 1985, EPA expects to have work underway on the cleanup of 221 of the NPL sites.

EPA can address only a limited number of the NPL sites each year. To the extent that private parties take action at NPL sites, the Fund's resources and EPA's management capabilities can be preserved for use at those NPL sites where no private action is anticipated. However, it is not enough that there be a private response. The public must be assured that its interests are adequately protected in the course of a private party cleanup. Private response must safeguard the public health, safety, and the environment. The cleanup decisions of private parties must take into account the views of the affected community and reflect the best available scientific and technical knowledge. To the extent that private institutional capabilities can be developed to achieve private party cleanups that meet these standards, the objectives of CERCLA are advanced. EPA has determined that CSI will have the necessary independence and professional integrity to facilitate, on an on-going and systematic basis, private response actions of the quantity and quality that merits EPA support.

A. CSI will address the most serious problems.

As provided in the Articles of Incorporation, CSI is

organized and is to be operated exclusively as a nonprofit corporation for 'charitable, scientific, (and) educational' purposes

within the meaning of section 501(c)(3) of the Internal Revenue Code of 1954 . . . ; and specifically to encourage, contribute to, and bring about the cleanup of hazardous waste sites in the United States. (Art. III. A)

CSI intends to coordinate its efforts to facilitate private party cleanups with EPA's planned remedial actions to avoid overlapping or duplication of effort. CSI will use the annual Superfund Comprehensive Accomplishment Plan which indicates EPA's planned response actions in each region to develop its own plan of action. CSI will generally address NPL sites and will seek preauthorization from EPA only for such sites. Consequently, the number of remedial actions initiated at the most serious hazardous waste sites will be increased since CSI's efforts will complement those of EPA.

B. The public interest will be represented.

In carrying out its objective of facilitating voluntary cleanups, CSI will perform the following functions:

(1) coalescing, with respect to particular hazardous waste sites, the relevant potentially responsible parties in support of negotiated settlements providing for clean-up of the sites; (2) scientific and technical review of remedial investigations, feasibility studies, proposals for clean-ups, clean-ups, and related matters concerning specific hazardous waste sites in which the corporation is active; (3) arranging for management teams to manage the clean-up of hazardous waste sites, and monitoring the work of and providing assistance to such management teams. (Bylaws, Art. 2, Sec. 2).

CSI will work with local governments, health and environmental groups, EPA and industry in developing acceptable cleanup plans. CSI may also follow through in a scientific advisory capacity to provide an impartial evaluation of the adequacy of

the cleanup and, in appropriate cases, managerial and technical oversight of the remedial projects (Form 1023, Exh. A, p. 3).

CSI has sought, and anticipates receipt of, tax exempt status under section 501(c)(3) of the Internal Revenue Code as a charitable organization. (Application for exemption, Form 1023, August 3, 1984). As an independent charitable organization. CSI will be able to solicit tax deductible contributions from foundations and others to cover part of the corporation's expenses. Thus, CSI will not be entirely dependent on industry funding for its activities.

To ensure that CSI's advice reflects the broad public interest, its Board of Directors will represent industry, environmental groups, and the public. Its initial Board of Directors consists of: Russell Train (Chair), World Wildlife Fund; Joshua Lederberg, Rockefeller University; Douglas Costle, Attorney; William Reilly, Conservation Foundation; Luis Fernandez, Monsanto Company; Edwin Gee, International Paper Company; and Charles Powers, Health Effects Institute. (Articles of Incorporation, Art. IX). Additional and new directors will be elected to the Board "after inviting recommendations from financial supporters of the corporation, the Administrator of (EPA), organizations actively concerned with the cleanup of hazardous waste sites, and other interested members of the public." (Bylaws, Art. V. Sec. 2).

CSI has no stockholders (Articles of Incorporation, Art. V; Bylaws, Art. 2, Sec. 1) and no part of any income to CSI will be distributed to the Board, officers or employees except as

authorized payment for services rendered (Articles of Incorporation, Art. VIII. A). To further insure that CSI decisions and advice are free of potential conflict of interest, the Bylaws provide that directors, officers and employees shall not participate in any decision with respect to a particular matter in which the director, officer or employee, or an organization with which such individual is affiliated, has or appears to have an interest (Art. 4, Sec. 8; Art. 6, Sec. 5; Art. 7, Sec. 7). CSI will not receive compensation from the PRPs associated with any site for which it may seek preauthorization from EPA (although CSI may, without remuneration, transmit funds from PRPs to third parties who furnish management services with respect to the cleanup of particular sites).

C. Quality advice will be provided.

CSI will employ, and have available on loan, highly qualified and skilled scientific, engineering, and legal staff to conduct its three basic functions, namely PRP coalescence, site planning, and site technical management. The staff will be intimately familiar with EPA requirements and policies regarding technical cleanup requirements.

D. The public will be informed of the private party activities.

As a tax-exempt charitable organizations, CSI has general financial accountability to the public. Further, CSI Bylaws provide that the corporation will develop and implement policy statements that:

- (1) encourage broad participation, particularly by persons residing near hazardous waste sites, in review of proposals for clean-ups of sites

and review of actual clean-ups; (2) provide for disclosure to the public, in connection with such review of the same kinds of data and information that the (EPA) customarily discloses to the public when the federal government is carrying out a cleanup. (Art. 2, Sec. 3).

Thus, CSI technical information and site data, including Remedial Investigation and Feasibility Study reports and other documents related to the cleanup will be made available to the public. CSI will conform to the policies and procedures developed by EPA for public participation under the Superfund program.

WRITTEN STATEMENT OF
THE AMERICAN GAS ASSOCIATION
BEFORE THE
SENATE ENVIRONMENT AND PUBLIC WORKS COMMITTEE
ON THE REAUTHORIZATION OF
THE COMPREHENSIVE ENVIRONMENTAL RESPONSE
COMPENSATION AND LIABILITY ACT OF 1980
FEBRUARY 25, 1985

The American Gas Association (A.G.A.) is a national trade association composed of nearly 300 natural gas distribution and transmission companies. Together, these companies serve over 160 million U.S. consumers in all 50 states.

When Superfund was passed in 1980, the Committee wished to cover both present and future hazardous substances; thus, it wrote broad definitions of the terms hazardous substance, pollutant, and contaminant into the Act. Because natural gases are undoubtedly flammable, they would have been regulated under the broad definitions but for specific exclusions which the Committee added (42 U.S.C. 9601(14) and 9604(a) (2)). Nothing has happened since Superfund was first passed to justify regulating natural gas in new environmental legislation. The purpose of the new legislation is to improve and extend public protection from toxic chemicals and contaminants. Yet natural gas, even if accidentally released, does not pose this type of threat.

Natural Gas and Its Components Are Not Contaminants

The principal components of natural gas are nontoxic, nonirritating, and not naturally reactive with other chemicals. For example, since natural gas is lighter than air it does not permanently "mix" in the soil. Thus, there are no environmental cleanup problems from natural gas residues. Furthermore, natural gas is virtually insoluble in water. It does not bioaccumulate and, in fact, is widespread in nature. Although natural gas is certainly flammable,* it is not mutagenic or carcinogenic. Indeed, some people produce methane -- the principal constituent of natural gas -- in their bodies.

Natural Gas Liquids Are Not Contaminants

There has been a lot of confusion about natural gas liquids. This arises because some "gas liquids" are not really liquids at all when they are under conditions of normal atmospheric temperature and pressure. Ethane, butane, and propane are stored and transported as liquids because they are kept artificially under pressure, but as soon as that pressure is released they become gases and dissipate into the atmosphere just as natural gas does. This means that, if they are stored in an underground tank that is ruptured (perhaps by a construction crew overhead) they will not "puddle out" into the soil and contaminate it.

* Natural gas is only flammable in mixtures of 5 to 15 percent gas to air. Combustion can only occur in this narrow range; mixtures leaner than 5% or richer than 15% gas to air are not flammable.

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Instead, ethane, butane, and propane will gasify and dissipate. These substances are not very chemically reactive and are also virtually insoluble in water. Like natural gas, any hazard is due to flammability -- not long lived toxicity.

There are other gas liquids, however, that remain liquids at standard temperature and pressure. These liquids are a small percentage of the huge volume of natural gas moving through the distribution and pipeline system. Because they decrease operating efficiency they are collected and removed at various points, called "drips", along the nation's one million miles of pipeline. Both the public and the environment are, however, protected from incidental contamination from these liquids. As an integral part of the pipeline system, drips are covered by the same set of pervasive Department of Transportation regulations that cover every phase of the gas delivery system.

The Department of Transportation Already Has Voluminous
Safety Standards for the Gas Industry

Historically, the gas industry has an exemplary safety record. Furthermore, the Natural Gas Pipeline Safety Act of 1968, as amended in 1976 and again in 1979, now governs virtually every phase of natural gas transportation, including liquefied natural gas, gas liquids, and "drips." DOT regulates design, siting, installation, inspection, emergency plans and procedures, testing, construction,

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expansion, operation, replacement and maintenance of pipelines. For example, 49 CFR Part 192 sets out detailed specifications for every aspect of pipeline design -- including the tensile strength of the steel, top valves, welds, meters, compressors, etc. Operators are required to test lines under pressure. Gas lines must be patrolled and inspected for leaks. DOT regulations require repair and reporting of leaks; if necessary, DOT may issue compliance orders. Failure to comply with an enforcement order can lead to significant civil penalties (\$1,000 per day per violation up to \$200,000) and, in some cases, to criminal penalties (\$25,000 and/or five years imprisonment).

Since drips may be of special concern, we want to stress that -- as an integral part of the pipeline system -- they are also covered by DOT regulations. This means that a drip point fabricated from 30-inch diameter pipe must be made of 1/2" thick pipeline quality steel, coated to prevent corrosion, and designed to withstand operating pressures up to 1,083 psi (pounds per square inch) -- compared to normal atmospheric pressure of 15 psi. Furthermore, they have the same electronic devices to prevent corrosion as the pipeline system; these devices are known as cathodic protection. Leaks from drips would be apparent to the pipeline inspector and the operator would have to record them, as with any other pipeline leak.

Although the term "drip" implies that the operator is collecting a waste product, these gas liquids are as

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valuable as natural gas itself. The liquids are periodically collected and sold to refiners. Even the collection and transportation of these liquids is DOT-regulated under the Hazardous Materials Transportation Act of 1974, as amended (49 U.S.C. 1801). Thus, EPA regulations for the literally thousands of pipeline drip points would be unnecessary and redundant.

New Superfund regulations for drip points would be a great burden on both EPA and the industry, but would provide no countervailing benefits. The number of drips varies from system to system; one company reports that it has several thousand "drip points", while another has 5,000 - 6,000 points. The average amount of liquid collected is 1 or 2 barrels (1 barrel=42 gallons). It makes no sense to require another federal agency -- in this case EPA -- to duplicate the work of the Department of Transportation, especially when DOT's regulations are in place and working well.

Summary

One of the prime purposes of Superfund is to allow EPA and/or state agencies to step in and clean up or police hazardous waste sites, but that authority is unnecessary for natural gas facilities. A.G.A. has been, and continues to be, a strong supporter of a federal pipeline safety program. DOT, with its in-place regulations and inspection system, can do a better job, faster. If there is a need, DOT can respond immediately. We do not need two federal agencies on the scene when one will suffice.

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Furthermore, natural gas and its components are not hazardous substances; nor are natural gas liquids, LNG and SNG. None of these energy sources mixes readily with soil or water. If released, they dissipate into the atmosphere. They are widespread in nature and in society. They do not bioaccumulate, nor are they mutagenic or carcinogenic. Thus, this Committee can safely conclude -- as it did in 1980 when Superfund was first passed -- that natural gas, LNG, SNG, and natural gas liquids are not hazardous substances, pollutants, or contaminants. We urge this Committee, in its upcoming consideration of Superfund, to retain the definitional exclusions for natural gas, liquefied and synthetic gas, natural gas liquids, and mixtures thereof.

A.G.A. appreciates the opportunity to provide its comments on this important issue.

American Petroleum Institute
1220 L Street, Northwest
Washington, D.C. 20005
202-682-8100



Charles J. DiBona
President

February 26, 1985

The Honorable
Robert T. Stafford, Chairman
Committee on Environment and Public Works
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Enclosed is the statement of the American Petroleum Institute submitted for the record in connection with the hearing on the reauthorization of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA). We urge you to schedule additional hearings to allow us and others vitally interested in this legislation to express our views and to respond to questions the committee members may have.

In summary, our statement strongly supports the reauthorization of CERCLA at a level of \$5 billion for five years. To raise \$1 billion a year, the petroleum industry supports the continuation of the existing petroleum and chemical feedstock tax--projected to raise \$307 million a year; a waste-end tax--projected to raise \$307 million a year with the remainder from general revenues, recoveries, interest and borrowing authority.

In addition, we recommend that the scope of Superfund should be limited to the cleanup of abandoned hazardous waste sites and not expanded to include a federal cause of action, public compensation or a demonstration program providing national health, disability and life insurance. Our statement discusses several other issues which we believe are important and should be considered by the committee during its deliberations.

Thank you for your consideration of this matter.

Sincerely,

cc: Members, Senate Environment and Public Works Committee

STATEMENT ON BEHALF OF THE
AMERICAN PETROLEUM INSTITUTE

BEFORE THE
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE

ON THE REAUTHORIZATION OF THE
COMPREHENSIVE ENVIRONMENTAL RESPONSE,
COMPENSATION AND LIABILITY ACT OF
1980

WASHINGTON, D.C.
FEBRUARY 25, 1985

The American Petroleum Institute (API) respectfully submits these comments on the reauthorization of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA). The API is a trade association serving approximately 6,000 individual and 235 corporate members in all facets of the petroleum industry. We appreciate this opportunity to present our views on Superfund reauthorization and particularly on S.51.

API strongly supports reauthorization of CERCLA. We believe that cleanup of the nation's abandoned hazardous waste sites and those portions of other waste sites for which no responsible party has been identified is an important national priority that must be addressed promptly and efficiently. We believe reauthorization of the law should remain firmly guided by that goal.

Our comments on reauthorization focus primarily on three points raised by S.51 and related proposals:

First, we believe expanding the coverage of Superfund to matters tangential to the cleanup of abandoned hazardous waste sites will merely lengthen the time needed to accomplish the cleanup. The nation should not be sidetracked from that objective. CERCLA should not be expanded nor should its focus be diffused by creating a federal cause of action or by establishing a public compensation scheme; nor should it be extended to cover cleanup of sites which are better dealt with through other federal statutes.

Superfund was enacted principally to ensure a ready source of federal funding to abate hazards from abandoned waste sites and to address those sites or portions of sites where responsible parties could not be determined or assessed for the cleanup costs. It was never intended to replace other environmental statutes such as the Resource Conservation and Recovery Act (RCRA), the Toxic Substances Control Act, the Clean Water Act or the Federal Insecticide, Fungicide, and Rodenticide Act.

Since the enactment of CERCLA in 1980, RCRA, for example, has been vastly expanded and now offers EPA new authority to bring enforcement actions against responsible parties for imminent hazards resulting from past conduct. If Congress yields to the temptation to toss in every environmental and health problem ranging from pesticide pollution to municipal landfills, it could overwhelm the resources of Superfund and destroy the effectiveness of the existing program. This temptation must be avoided, and these other problems should be addressed separately.

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Second, we believe the size of the fund should be increased to a level commensurate with the Environmental Protection Agency's (EPA) capacity to use the fund's revenues efficiently. API supports a fund size of approximately \$1 billion a year for five years -- the range EPA said it could efficiently spend to carry out its mandate to clean up abandoned waste sites. This is more than a threefold increase over the existing level. Funding at this level would allow the agency to move forward to deal effectively with the most critical abandoned hazardous waste sites needing cleanup.

Third, to provide revenues for the response fund, we believe the sources of funding for CERCLA should be broadened, reflecting the facts that (1) EPA has found wastes from all types of businesses in most hazardous waste sites, (2) the petroleum and chemical industries pay more than their fair share of Superfund taxes, and (3) cleanup of orphan sites is a general societal problem.

Additional comments address impediments to voluntary site cleanup, cleanup standards, health-related authorities and the petroleum exclusion.

THE SIZE OF THE FUND

API believes that the size of the Superfund should be increased to a level no higher than \$1 billion a year for five years. EPA Administrator Lee M. Thomas has stated repeatedly that expenditures at the rate of \$1 billion a year are all that EPA can handle effectively. Business Week in its February 25, 1985 issue quotes Mr. Thomas: "When you balance the need for responding to public needs and effective management of the program, I feel \$1 billion a year is the proper pace."

In November, Mr. Thomas commented on his \$5 billion estimate in an interview with the Chemical Manufacturers Association:

"In discussions with the House Ways and Means Committee, I used a figure of \$5 billion over five years, when they asked me about continuation of the program. That figure came from my estimation.

"The program has grown tremendously in terms of people and in terms of dollars. It's gone from about \$200 million a year to over \$600 million a year in this coming year, and about double the staff.

"I don't think the program can grow any faster than that. I think we are reaching the point where we're dealing with as many sites as can be effectively dealt with at any one point in time."

A fund of \$5 billion over five years represents a year-by-year increase in spending of 20 percent. Using EPA's proposed budget for Superfund in fiscal year 86, calling for

spending of \$670 million, the increases would be: FY 86 -- \$670 million, FY 87 -- \$804 million, FY 88 -- \$964.8 million, FY 89 -- \$1.158 billion, and FY 90 -- \$1.389 billion. Total expenditures for the five years would be \$4.986 billion.

Some might argue that the fund could be increased more than 20 percent a year because annual expenditures from the fund increased at greater rates during the start up of the program. However, continued large percentage increases in the fund should not be imposed over the long term if the program is to be efficiently managed. Overburdening the financial manageability of this vital national program would be inefficient and thus counterproductive.

SCOPE OF CERCLA

API believes that the purpose and scope of Superfund should remain firmly guided by the need to clean up dangerous hazardous waste sites that jeopardize the nation's environment. To add a public compensation function would place a serious drain on the Superfund program while to add a federal cause of action provision could flood the courts with unsupported claims and delay cleanup.

Federal Cause of Action and Public Compensation

Certainly, persons with an illness or injury caused by exposure to hazardous substances should have recourse to the responsible party. But this issue should be considered separately from CERCLA, and neither a special fund nor a federal cause of action is the answer.

There is no evidence to support the assumption that many people are being subjected to significant risks from hazardous substances or that many people are uncompensated for illness due to those substances.

The overwhelming weight of scientific evidence does not show the existence of widespread illness due to hazardous substances. To the contrary, recent publications by recognized members of the scientific community suggest that the primary causes of cancer, the most prevalent chronic illness, are related to factors other than environmental exposure to hazardous substances.

Testimony prepared for Congress in 1984 by Dr. Philip Cole of Epidemiology Resources Incorporated debunked the popular perception that the health of Americans is deteriorating and that cancer, for example, is on the rise. Dr. Cole noted that life expectancy has increased steadily in the United States during the 20th century, primarily because of a reduction in chronic disease mortality rates among adults. Dr. Cole added that cancer rates, other than those due to smoking, are stable or slightly declining. He expressed the view that diet, smoking and other aspects of "lifestyle" are the most important known causes of

cancer -- far more important causes than occupational and environmental exposure to hazardous substances.

Other studies have supported this view. In 1981, Sir Richard Doll, an internationally recognized physician and epidemiologist, and his associate, Richard Peto, found that the best estimate is that occupational exposure accounts for about 4 percent of all cancer-related deaths and environmental pollution less than 2 percent. Similar estimates were published in 1981 by the Congressional Office of Technology Assessment.

The role of diet in causing cancer was recently explored by Dr. Bruce Ames, chairman of the Department of Biochemistry, University of California in Berkeley, in an article in Science magazine. Dr. Ames discussed the increasingly persuasive evidence that carcinogens naturally present in certain foods may play a significant role in causing cancer. He pointed out that "human dietary intake of nature's pesticides is likely to be several grams per day -- probably at least 10,000 times higher than the dietary intake of man-made pesticides." He concluded that "diet, which provides both carcinogens and anti-carcinogens, is extremely likely to be another major risk factor" (in addition to tobacco).

A number of other scientific and medical reports in recent years have implicated fatty diet as a major culprit in heart disease and cancer. Additional reports have linked alcohol consumption to certain types of cancer. As a result, the U.S. Health and Human Services Department has recently established an information program to persuade Americans to eat fewer fats and oils and more fiber, to limit their alcohol intake and to give up tobacco, with the goal of cutting cancer deaths by 25 percent by the year 2000. That is a modest goal -- the best scientific estimates suggest that nearly 70 percent of all cancers can be attributed to tobacco, diet and alcohol.

CERCLA recognized that the collection of accurate data is essential in combatting health hazards related to waste disposal sites. Section 104(i) of that law called for establishing within the Public Health Service an agency that would implement the health-related authorities of CERCLA and work in cooperation with several other government agencies to (1) establish a national registry of serious diseases and persons exposed to toxic substances; (2) establish an inventory of literature and research on the health effects of hazardous substances; (3) establish a list of areas closed to the public because of toxic substance contamination; (4) provide medical care and testing in cases of public health emergencies due to toxic substances exposure; and (5) conduct periodic surveys and screening programs on exposure and illnesses.

Even though Superfund established the new agency in December 1980, by December 1982 the government had not implemented that mandate. Therefore, API intervened, with the Chemical

Manufacturers Association, in a successful lawsuit to require the government to create the agency and gather the data. Belatedly underway in 1983, the agency has begun to update publicly available chemical and toxicological data and, with the National Library of Medicine, has begun cancer cluster evaluations, has consulted with state and local governments on several hundred emergency responses during 1984 and has performed many other activities relating to its primary mission.

If a general public health problem due to exposure to hazardous substances is identified, it should be dealt with. But today's evidence points in the other direction. Therefore, the best interests of the American people would not be served if major new policy excursions were to be based on assumptions not supported by knowledge available today on the causes and incidence of disease related to hazardous substances.

There does not appear to be any general failure of individuals and society to provide compensation for the costs of chronic illness. In fact, through a wide variety of public and private means, about 85 percent of the U.S. population is insured for both loss of income and medical expense due to chronic disease -- regardless of the source of the illness.

These programs include private health insurance, Medicare, Medicaid, Social Security Disability Insurance, the federal Supplemental Security Income Program, workers compensation programs, private disability and life insurance, and specialized programs such as the black lung and harbor workers' and longshoremen's programs, veterans benefits, federal employees compensation and others.

Individuals also have recourse to state courts, with well-established rights to sue based on negligence, private and public nuisance, trespass and strict liability. Several thousand such cases are filed each year, demonstrating that such claims can be litigated without a federal cause of action. Moreover, most of these claims are settled out of court before a verdict is reached -- further evidence that the system provides compensation.

Congress itself, in passing CERCLA in 1980, recognized that the need for a federal cause of action had not been established and thus, under Section 301(e), set up a study group on legal remedies. The group unanimously opposed creating an "add-on" federal cause of action. The 1982 report focused instead on barriers in the state court system, including proof of cause of a disease, restrictive statutes of limitations and high transaction costs, especially for relatively small claims.

As the study group concluded, a federal cause of action would do nothing to resolve these problems. They can and should be resolved at the state level. For example, the study group noted the most significant barrier in the courts is the statute of

limitations, which in a few states may run out before an individual even discovers he has a disease. However, the study group found this to be a problem in only six jurisdictions and recommended that this problem be addressed at the state level. Substantial efforts toward that end have been underway. In fact, one state supreme court and lower courts in four of the remaining five jurisdictions have, in effect, construed statutes of limitations to run from the date a person discovers an injury. Thus, in five of the six states, the problem with the statute of limitations has been alleviated. The statute of limitations continues to present a problem only in New York. The New York State Legislature examined the issue last year and is reexamining it this year.

In short, the need for either a federal cause of action or a compensation fund has not been established, and such provisions would create their own serious problems.

Problems Specific to Federal Cause of Action

A federal cause of action would greatly aggravate the problems of an already overburdened federal court system. It would generally duplicate the existing right to sue in state court and thus would cause confusion and delay. Cases would be heard under "concurrent jurisdiction," in either or both federal and state courts. Obviously, such cases would be cumbersome, lengthy and costly.

Moreover, there would be conflicts between federal and state law. There would be two different sets of rules, and conflicts could arise in matters such as relevancy of scientific evidence, damages subject to compensation, statutes of limitations and punitive damages.

Also, a federal cause of action would combine and confuse two distinct issues -- personal injury and cleanup of a waste site. Terms and definitions in CERCLA are based on the requirements of cleaning up waste sites; they are not appropriate or correct for use in personal injury cases.

In addition, a number of specific related provisions in Amendment Number 3 to S.51 would only make matters worse. There would be extensive duplication, involving not only the right to sue, but also the standards of liability (both strict and joint and several), punitive damages, economic loss resulting from injury and damage to property, the procedural requirements for class action under certain circumstances, and the admission of evidence under certain circumstances.

Specifically, Amendment Number 3 would circumvent the existing class action and evidentiary procedures, disrupting a system that works well. The amendment would override the existing federal rule that sets forth conditions for bringing such suits. Congress should not remove a federal judge's

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prerogative to determine the appropriateness of the class of plaintiffs. While such cases may involve common issues of fact or law, damages for personal injury are difficult to try across-the-board on a class basis. Nor should certain types of evidence be automatically deemed irrelevant, thereby removing the judge's discretion to exclude inaccurate, unreliable or prejudicial evidence from the jury.

Also, the amendment would flood the courts with speculative cases by including "pollutants and contaminants." Unlike hazardous substances, there is no readily available list of pollutants and contaminants. Given certain site conditions, almost any matter could qualify.

Finally, under the proposed federal cause of action in Amendment Number 3, we are concerned about open-ended liability for damages -- created by allowing damages for "pain and suffering," as well as punitive damages and economic loss resulting from injury and harm to property. In combination, these provisions raise the prospect of massive lawsuits involving enormous numbers of plaintiffs and many billions of dollars. Many businesses would find it impossible to insure themselves against such claims.

Problems Specific to Public Compensation

While S.51 does not contain a compensation fund proposal, such a proposal was included in last year's bill. We note that there is a heading in the current bill that provides for such a program. A personal injury compensation fund, by drawing from the Superfund, would dilute that fund and slow the cleanup of hazardous waste sites.

National experience with other special funds shows that costs can grow out of control. For example, the black lung program -- originally intended to compensate underground coal miners afflicted with certain employment-related lung diseases -- has been amended in ways that gradually eroded any requirement for meaningful evidence of the disease or that the illness was caused by coal mine employment. As a result, the program by 1981 had grown more than 33 times the original projection and now costs \$2.5 billion a year. A 1982 General Accounting Office report to Congress stated that in 84 percent of the approved claims, medical evidence of black lung disability or death was either nonexistent, inconclusive or conflicting.

Similarly, in 1927 Congress passed the Longshoremen's and Harbor Workers' Compensation Act to compensate maritime employees injured on the job. The act has been amended 12 times since 1927, with major changes in 1972 that substantially increased and extended benefits and coverage. From 1972 to 1982, expenditures for this program grew more than 700 percent -- from \$43 million to \$355 million. In 1984, the act was substantially amended again to reduce or eliminate certain benefits.

The potential for runaway costs in a hazardous substance fund would be even greater. A hazardous substance fund could apply to anyone exposed in any way -- in other words, virtually anyone in the nation. Thus, an enormous number of claims could be allowed -- involving cases of disease having little or no connection to hazardous substances. Such a fund truly could become national health, disability and life insurance for many chronic illnesses, with costs growing into many billions of dollars a year.

The Superfund should not have to compensate persons whose own behavior caused their illness. The body of scientific evidence on this subject shows that the potential health hazards related to exposure to hazardous waste sites are extremely low -- for example, the best estimate is that only 2 in 100 cancer-related deaths might be due to environmental exposure. Yet, due to the difficulties inherent in identifying a specific cause of a specific cancer, the fund could become a readily available source of compensation for all 100 of these cases and many more human health problems.

The health care of the nation is important. But it would be wrong to create a massive back door national health care or insurance program under the regime of Superfund. Rather, consideration of national health care and national health, disability and life insurance issues should be debated as such -- not under Superfund -- so that Americans are not misinformed or falsely led to believe hazardous substances are the primary cause of health problems.

In sum, API believes the need for a special compensation program has not been shown. We are concerned about the high potential costs of such a program and the ability to limit beneficiaries of the program to those actually harmed by exposure to hazardous wastes. Those actually harmed have recourse under existing systems. Moreover, we are concerned that a personal injury fund or a victims assistance demonstration program, such as that proposed in the Senate during the last Congress, would place a serious drain on the Superfund program and detract from what should remain its primary goal -- the cleanup of abandoned hazardous waste sites.

BROADENING CERCLA'S FUNDING

API believes that the funding of an enlarged Superfund must be more broadly based than is the case today. The cleanup of the effects of past disposal practices is a general societal problem. The oil and chemical industries already pay more than their fair share of Superfund taxes, and these two industries would face severe competitive problems in the world marketplace if their tax burden were to be greatly increased.

In short, the current CERCLA tax system results in economic dislocations and is inequitable. Increasing the current tax rates would simply exacerbate the existing distortions.

Impact on the Refining Industry

Increased CERCLA taxes could create tremendous burdens on U.S. refiners. Based on recent domestic refinery runs, each one cent per barrel increase in the CERCLA tax on crude oil would raise domestic refiners' costs by about \$45 million per year. Thus a seven cent per barrel increase, such as the tax that Congress considered in 1984, would increase domestic refiners' annual costs by more than \$300 million. An additional tax burden could well cause cutbacks in domestic refining in addition to those already experienced by that industry.

There is substantial idle capacity in the domestic refining industry, despite the U.S. economic recovery. Since 1981, one hundred domestic refineries have ceased operating. That represents a reduction of almost one-third of all U.S. refineries. Even with that reduction, the remaining refineries continue to operate 25 percent below capacity. While nationwide refinery profit margins are not available, Gulf Coast refinery estimates, accounting for about 40 percent of U.S. refining, show negative average operating margins since the fourth quarter of 1983. In addition, several large companies, for which data are available, had refining/marketing profits of less than one cent per gallon, which suggests that their operations were at best only marginally profitable. Other large companies reported refining/marketing losses.

In sum, the domestic refining industry has fared poorly during the past few years. The industry is suffering from lower demand for refined products, heightened competition from product imports, the high costs of upgrading refining facilities and substantial additional environmental control costs. Singling out these refiners for increased CERCLA taxes, when they are already paying more than their fair share, would make even worse an economic environment that has seen a loss of 11,000 jobs in the U.S. refining industry.

Why the Funding Base Should Be Broadened

There are compelling arguments for broadening the base of funding for Superfund.

First, Superfund benefits the entire population of the nation. The Superfund cleanup effort helps provide a cleaner environment for everyone as well as for the diverse group of residents and property owners who more directly benefit from cleanup.

Second, although the petroleum and chemical industries pay the entire amount of the current feedstock tax, hazardous wastes are generated by many more industries throughout the economy. A high percentage of the oil and chemical wastes found at waste sites were deposited by those who use such substances in manufacturing processes. For example, petroleum solvents are

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used as degreasers in the electronics industry and prior to the application of paint on metal surfaces by auto and appliance manufacturers.

At the Stringfellow site in California, for example, EPA has identified 291 potentially responsible parties who may have contributed waste. A very small percentage of those identified are petroleum or chemical companies. At Stringfellow, the potentially responsible parties include a broad cross section of U.S. industrial and agribusiness concerns -- large and small. These companies make products consumed throughout the United States by all of society. Other contributors of waste at the Stringfellow site were the City of Los Angeles, the U.S. Air Force and the U.S. Navy.

A look at substances found at hazardous waste disposal sites reveals similar inequities. According to EPA, of the 30 most frequently found substances at 881 hazardous waste disposal sites, only 11 are subject to the tax. Of the seven substances found most frequently at these sites, only two are subject to the tax.

A report to EPA has estimated that petroleum refiners generate less than 5 percent of the nation's wastes. Yet the petroleum industry currently provides about 15 percent of Superfund's revenues. Under several funding schemes, that percentage would increase several-fold. This would clearly be inequitable.

Third, it is also important to note that current producers or users of hazardous materials are not necessarily those who were responsible for problems at abandoned CERCLA sites. Often, the firms are no longer in business.

Fourth, it is simply not fair to ask these two industries to shoulder a vastly increased burden for cleanup of abandoned waste sites, for which others are responsible. Currently, oil and chemical companies may pay in three different ways for hazardous waste cleanup. First, oil and chemical companies pay when they undertake voluntary cleanup of a site. They pay again when they are identified as a responsible party at one of the sites under EPA's jurisdiction. And they pay a third time through current feedstock taxes, contributing 85 percent of the current fund that is used to clean up problems from the past caused by firms that cannot be identified or are no longer in business.

A More Equitable Funding Base

API recognizes that, in the process of reauthorizing Superfund, Congress is unlikely to repeal existing taxes. However, we urge that current crude oil and feedstock tax rates not be increased.

API suggests that funding of CERCLA at a level of \$1 billion could be raised from a \$307 million a year feedstock tax to be paid for by the petroleum and chemical industries; a \$307 million a year waste-end tax; \$176 million a year from general appropriations; and \$210 million a year from recoveries from responsible parties for the cost of cleanup, interest and borrowing authority.

This approach relies on the current feedstock tax now imposed on 42 basic chemicals that enter the manufacturing process to become other products and on crude oil and petroleum products. This tax is paid by the chemical and petroleum industries.

A newly created waste-end tax would be imposed on disposal of manufacturing wastes. The oil and chemical industries would pay a major part of such a waste-end tax, but other businesses would also pay a share. This waste-end tax would broaden the fund's tax base and relate to the current environmental practices of those who would be taxed.

The fund should also place greater reliance on general revenues. General revenues provide the broadest and fairest source of funding because all taxpayers contribute and benefit. If general revenues are relied upon, economic decisions are not distorted as they would be when taxes are targeted on specific industries. Moreover, general revenues provide an equitable source of funding because all society benefits from cleanup and because municipalities, states and the federal government have contributed to the problems addressed by CERCLA.

In sum, general revenues are the most equitable source of funding for the entire response fund. However, API is not recommending that approach. We propose continuing the existing feedstock tax and adding a new waste-end tax which would together generate \$614 million a year. Any other funding needs should be supplied from general revenues, cost recoveries, interest and borrowing.

If general revenues are not used to make up any shortfall in the amount required for CERCLA funding, a broad-based tax would be more equitable and less harmful than an increase in the current crude oil and feedstock taxes or a waste-end tax of more than \$307 million.

OTHER RELEVANT ISSUES

Impediments to Voluntary Site Cleanup

If sites containing hazardous substances are to be cleaned up in an expeditious fashion, then private party action must be encouraged as a necessary complement to governmental cleanup. Currently, CERCLA fails to include certain basic legal protections for private party cleanups. Certain specific provisions actually deter such action. API believes that

encouraging responsible private party response action at single and multi-party Superfund sites is a worthwhile goal. CERCLA should be amended to encourage the expertise and the resources of the private sector to be used to help remedy this national problem.

1. Protections Must Be Revised

Section 107(d) of CERCLA currently purports to protect a person from future liability for rendering care, assistance or advice in accordance with the National Contingency Plan (NCP) or at the direction of an on-scene coordinator. This provision, as now in the law, has severely limited utility. Section 107(d) protects a party from liability merely for "damages" -- a term which Section 101(6) of CERCLA defines as "damage for injury or loss of natural resources." While API believes such "damages" should be included in any type of "Good Samaritan" protection, Section 107(d) should be expanded to include all "response costs." No volunteer should be expected to act when faced with incurring potentially endless future liability after payment of the initial response costs at a site.

2. The Liability Provisions Must Be Reexamined

The existing case law interpreting CERCLA indicates that Section 107: (1) allows the imposition of strict, joint and several liability, and (2) provides no meaningful defenses to liability (for example, there will be liability even when third party action was clearly the cause of the damage). This unusually broad liability inhibits voluntary cleanup. API believes that the liability provisions should encourage voluntary site cleanup:

- a. At multi-party sites, clean-up action voluntarily undertaken by a party should not be used as evidence of the party's responsibility for the entire site. Such voluntary action should not be admissible in any subsequent legal proceeding.
- b. At multi-party sites, equitable apportionment of damages should be guaranteed to volunteers. In many instances, because volunteers may also be responsible parties, they will be reluctant to act because they might be held liable for all response costs and damages. In this regard, joint and several liability deters voluntary action. If volunteers are ensured that they will have to pay based upon an equitable apportionment of the costs and damages, they will have an incentive to act aggressively to clean up waste sites.
- c. There should be an acknowledged right of contribution -- that is, a right to collect from potentially responsible parties for their portion of a multi-party site cleanup. Such a right is imperative if volunteers are to have any incentive to clean up hazardous waste sites. If volunteers

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are partially responsible for a site cleanup, they may be willing to clean up the entire site if they have a right of contribution against another responsible party or against the fund if the responsible parties are insolvent or bankrupt.

d. Finally, API believes that CERCLA has gone too far in eliminating traditional liability defenses regarding the negligence of third parties. API believes the act should reflect the more modern concept of "comparative negligence." Other defenses could be added which would provide an incentive for more aggressive private party voluntary cleanup.

The overbroad liability provisions contained in CERCLA should be modified in instances of voluntary cleanup. Greater equity in the statute will, we believe, promote more voluntary action.

3. Releases from Liability

If voluntary cleanup is to be encouraged, responsible parties should be released from future liability both at the site being cleaned up and at sites where cleanup material may be deposited in accordance with the National Contingency Plan (NCP). No party will be inclined to initiate a voluntary cleanup without some reasonable assurance that at some certain point in the future his obligations will terminate. Volunteers who adhere to the NCP or follow the directions of an on-scene coordinator should be protected from all future liability. Under the existing law, the incentive is to force the government to order cleanups so the responsibility for future lawsuits is shifted to the government.

At a minimum, Congress should encourage EPA to execute responsible liability releases at primary and secondary sites. Although such protection is already implicitly part of the broader "Good Samaritan" provision of CERCLA Section 107(d), the "release" authority should be specifically clarified. Moreover, in clarifying the release authority, the use of "partial releases" should also be addressed. In many instances, site cleanup can be divided into distinct phases. Often certain removal actions, if taken expeditiously, can avoid the need for more costly remedial actions at a later date. EPA should not be prevented from releasing a voluntary party, with a "partial release," if the voluntary party takes a response action.

4. Neither EPA nor Outside Parties Should Be Allowed to Delay Voluntary Cleanup

To encourage more voluntary action, CERCLA should free volunteers from needless federal or state approvals so long as the actions are consistent with the NCP. Public participation in voluntary cleanup actions should not impede or delay the progress of the cleanup.

Voluntary cleanup actions, even when involving potentially responsible parties, should not be delayed by needless federal red tape or attack from outside parties. Many removal type actions, such as those associated with spill cleanup, will be undertaken by private parties so long as there are no unnecessary legal hurdles. Extensive preapprovals by EPA, state, local, or even public interest groups will delay or even prevent such voluntary actions. API recognizes that there is a legitimate interest in preventing voluntary cleanup from becoming a loophole that impedes sound response action, but we believe that the private sector must be encouraged to participate with equitable and fair rules. The early history of CERCLA recognizes that a majority of these sites came into being because there was insufficient knowledge about proper waste disposal, not intentional misconduct.

Cleanup Standards

Section 106 of S.51 provides that remedial actions attain a degree of cleanup that is "relevant and appropriate under the circumstances" surrounding the specific situation. API supports such an approach that allows EPA to take into account the broad range of variables that could apply to each cleanup situation. We believe that legislation should not specify cleanup standards but should instead establish guidelines for regulatory action.

Currently, CERCLA does not directly specify standards, but rather directs EPA to establish cleanup methods and criteria for determining the extent of cleanup within the National Contingency Plan. Under this plan, for each Superfund site, EPA must analyze several cleanup options for their cost and effectiveness. EPA then must choose the alternative that will most efficiently protect health and the environment. We believe that this approach allows EPA to deal effectively with most releases.

Thus, we generally support the approach in S.51 because it would maintain this regulatory framework for establishing cleanup standards on a site-specific basis. General guidelines, such as the provision in S.51, can, for example, appropriately take into account the broad range of variables that apply to groundwater characteristics and use (i.e., proximity to population, hydrogeological setting, existing quantity and quality of groundwater, persistence and solubility of pollutants). Because of the many differences between aquifers, specifying mandatory national cleanup standards in legislation (as was proposed by the House in 1984) would lead to an inflexible, impractical, and needlessly expensive program.

Our support for cleanup standards that are "relevant and appropriate" is premised on the use of best available science, objective analyses of risk reductions associated with remedial actions and a balancing of risk reduction and costs. Society's resources are scarce and should be used in ways that produce the greatest benefits to society.

Health-Related Authorities

Under Section 110 of S.51, EPA must perform a "health assessment" for each release, threatened release, or site on the National Priority List. Further, such assessments may be conducted if individuals or physicians inform EPA that a person has been exposed to a hazardous substance "for which the probable source of such exposure is a release." We are concerned that these assessments will duplicate current programs, will lead to an excessive number of claims that could drain the fund and will not be closely tied to situations that represent potentially serious risks.

First, a number of assessments called for in this section may duplicate other federal programs, including the 1984 Amendments to RCRA. For example, the proposed studies may duplicate the current activities of the registry of toxic diseases under Section 104(i) of CERCLA. The testing and registration requirements of the Toxic Substances Control Act and the Federal Insecticide, Fungicide and Rodenticide Act would be duplicated in many instances for testing of materials. To avoid this kind of duplication, existing programs and the data bases they provide should be evaluated to identify information gaps before any new programs are proposed. However, any changes should be considered separately from CERCLA.

Second, although API recognizes the need to gather appropriate health-related information relative to hazardous waste sites, we are concerned that Section 110 could lead to a large number of inadequately founded claims for action. A person who contracts an illness could conceivably demand an extensive health assessment merely because he, at some time, drove past a waste site possibly containing a certain chemical. Because of the extensive nature of the health assessments which would be required under S.51, API believes that some stronger rationale for initiation of the studies should be required.

An excessive number of duplicative or speculative health assessments could drain the fund. Under this provision of S.51, if the assessment shows that the population has been exposed to the release of a hazardous substance, then the costs of the assessment may be recovered from the fund. Thus, initiation of numerous health assessments could limit the funds available for cleanup of hazardous waste sites -- the primary goal and most pressing need of CERCLA.

Third, the goals of this section could be better served by a comprehensive, objective study of the health risks associated with exposures to hazardous wastes and the nature and causes of chronic diseases. The public interest would be well served by having a prestigious scientific group clearly and factually address the allegations and assumptions that have become the foundation for both legislative and regulatory initiatives.

Petroleum Exclusion

API strongly supports the current petroleum exclusion and its continuation in S.51 because the release of petroleum associated with petroleum industry operations is handled under other laws and regulations. Including petroleum under CERCLA would create duplicative, costly, and burdensome requirements on the industry. The scope of CERCLA would also be unnecessarily broadened, detracting from the principal goal of cleaning up hazardous waste sites. Indeed, it would represent a large potential drain on the CERCLA fund, thereby slowing cleanup of toxic waste sites.

In passage of CERCLA in 1980, Congress specifically excluded petroleum and certain related products from the definition of "hazardous substance" in Section 101 and from the definition of "pollutant or contaminant" in Section 104. API strongly supports the continuation of this exclusion for a number of reasons. First, the physical properties of petroleum (oil) and how it behaves in the environment are considerably different from most hazardous chemicals. Second, a significant body of law and regulation already exists to protect the public and the environment from damage due to oil spills. Finally, the major concerns associated with groundwater contamination from hazardous waste disposal and from underground tanks are now properly addressed by the recent RCRA amendments.

Federal statutes and regulations dealing with petroleum have recognized that petroleum is fundamentally different in several important respects from most "hazardous substances." For example, most petroleum materials are subject to relatively rapid biological degradation in the environment, thus allowing the widespread use of land treatment for many oily refinery wastes. Indeed, existing oil spill prevention, detection, and response systems are so dramatically different from those for hazardous substances that including oil in the same regime would only serve to complicate emergency response and remedial action for both. As former Senator John Culver (D-Iowa) noted in introducing an oil spill bill in 1979, "The problems posed by hazardous chemicals alone are widespread and complex and require extensive attention in their own right."

Since the early 1970s, the federal government and several states have adopted laws to protect the environment from oil spills and to provide a funding mechanism for spill response and liability. Some examples include: (1) the Clean Water Act, which establishes a fund for cleanup of releases of oil and designated substances to navigable waters; (2) the Outer Continental Shelf Lands Act of 1978, which provides for liability and cleanup for oil drilling and production operations on the OCS; (3) the Deep Water Port Act of 1974, which established a fund to compensate for damages from deep water port operations; (4) the Trans-Alaska Pipeline Authorization Act of 1973, which covers the movement of oil from Alaska to U.S. ports; and (5) laws enacted by at least six coastal states to deal with oil spills.

Also, because petroleum is ubiquitous in our society, its handling is regulated by an extensive array of programs, such as fire and safety codes, at the state and local levels.

Recent congressional interest in removal of the petroleum exclusion has centered around concern for problems associated with underground storage tanks. API believes, however, that the RCRA amendments passed in 1984 provide adequate coverage for these tanks. The underground tank provision in RCRA covers tank registration, federal technical standards, state program administration, and special reports to Congress. Indeed, Congress stressed that the states should manage the underground tank program because the risks and consequences of leaks vary from one area to another, thus making localized response the best solution. Many states are in the process of developing their own programs (including cleanup programs for all types of leaks), and the petroleum industry is cooperating in those efforts wherever possible. In a statement on the Senate floor on October 11, 1984, Senator Symms (R-ID) noted that one important feature of the RCRA tank provision is that it allows states to set up comprehensive programs, "including the authority to establish funds to respond effectively to leaks, regardless of whether the leak can be traced to a responsible party or is an orphan leak."

The oil industry is committed to solving the problems of leaking underground petroleum tanks. API has developed a set of standards or recommended practices dealing with leak prevention, detection, and mitigation which could serve as a basis for more formalized regulatory initiatives. Many oil companies have undertaken aggressive programs to upgrade and replace suspected tanks with specially protected steel or fiberglass. Industry will continue this active posture as EPA implements its mandate under the recent RCRA amendments.

The Superfund is designed to deal primarily with hazardous waste dump sites, and a lengthy, expensive, step-by-step process has evolved to prioritize the sites and clean them up in a systematic, uniform manner. Superfund is designed to handle a relatively small number of major, potential problems, not a very large number of minor ones.

Further, Superfund has been interpreted to impose strict, joint and several liability upon everyone in the chain of commerce. Such liability is excessive in the case of petroleum, which could entail a refiner or jobber being held strictly liable for leaks in tanks of their customers, for example, tanks at service stations.

ATLANTIC RICHFIELD COMPANY TESTIMONY

ON

REAUTHORIZATION OF

THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION

AND LIABILITY ACT OF 1980

SENATE ENVIRONMENT COMMITTEE

FEBRUARY 25, 1985

My name is Harold A Sorgenti. I am a Senior Vice President of Atlantic Richfield Company and the President of ARCO Chemical Company. I am here to testify on reauthorization of the hazardous substances superfund law, both as a representative of our Company, and on behalf of several thousand fellow employees who will be affected by this legislation.

In recent months, spokesmen from many different interests have discussed the need for a comprehensive federal program to clean up hazardous waste sites and to provide remedial action for the release of hazardous substances into the environment. The Atlantic Richfield Company has been prominent in these discussions and has supported the continuation of a fund to pay for these environmental clean-up activities where no responsible parties can be found. We continue to advocate this principle and are prepared to offer additional specific suggestions to supplement our previous discussion of taxation mechanisms for support of the fund.

However, we must also voice our concern and opposition to legislative proposals that would vastly increase the rate of the feedstock tax used to finance superfund. A multiplication of the feedstock tax would have a disastrous impact upon the United States petrochemical industry and the thousands of jobs that it supports. Due to the seriousness of this issue, I would like to address it first in my testimony.

The United States petrochemical industry may be defined as the companies and

workers who produce eleven organic chemical feedstocks which are currently subject to the federal superfund tax. These chemicals are:

Acetylene

Benzene

Butadiene

Butane

Butylenes

Ethylene

Methane

Naphthalene

Propylene

Toluene

Xylenes

Over the past several years, this industry has suffered from both overcapacity, and significantly increased costs for the petroleum fractions and natural gas streams used in production. Annual growth in the industry has dramatically slowed from levels in excess of 10% down to about 3-4% per year.

Profit margins on many products were reduced or eliminated during the recent downturn. It is estimated that the petrochemical industry lost \$350 million to \$400 million in 1982. The industry continued to operate at a loss in 1983 and just improved to the break-even level in the first quarter of 1984.

As a producer with about 6-8% share of the petrochemical market, ARCO Chemical's performance was consistent with the rest of the industry. Like several other producers, we were forced to shut down a number of facilities

producing petrochemicals or their derivatives.

However, despite these difficulties, Treasury Department data show that superfund tax payments made by the petrochemical industry average \$155 million per year.

It should be noted that these taxes were paid mainly by the producers of the eleven chemicals, with only partial tax cost passthrough. They are based upon the rates contained in the superfund legislation passed in 1980 and represent 66% of all the money that the Treasury Department reported as being collected. It should be noted that in addition to paying taxes into superfund, these same companies pay clean-up costs directly when they are identified as responsible parties.

Some legislation would now increase the tax rates on these chemicals by factors ranging from 300-600%. The legislation's sponsors have apparently assumed that the petrochemical industry can continue to bear approximately two-thirds of an expanded annual revenue objective of \$1.5 billion or so.

Unfortunately, this assumption is erroneous. The increased tax rates will instead force a reduction in the petrochemical tax base through plant shutdowns and the export of the manufacture of these chemicals and their downstream derivative products to resource rich foreign countries. Ironically, we will be damaging one of the few industries that provides this nation with a superior technological position and a positive balance of payments. When this occurs, the base for collecting the tax will be significantly eroded, leaving us with a shortfall that will have to be secured from other sources.

Thus, the real results of this legislation will be a less effective program for funding dumpsite cleanup, and the destruction of the domestic petrochemical industry, coupled with the loss of thousands of manufacturing jobs.

Some specific points to substantiate this conclusion follow:

1. Increased tax rates exceed profit margins.

Historically, profit margins in the entire chemical industry have ranged between 5% and 6%. More narrowly, profits in the petrochemical industry have not reached even these levels. Proposed of increased taxes say that the tax rates on the eleven petrochemicals are equivalent to 3% of their sales price. This is not the case. Actual data show that the proposed rates amount to 5-6% of sales prices, a rate that exceeds the best profit margin that the petrochemical industry can hope to realize. In other words, these rates will essentially tax away any incentive to stay in this business.

2. A free market will not allow tax cost passthrough.

In an industry with substantial excess production capacity, it is not possible for producers to pass on the superfund tax to their downstream customers. For example, domestic production capacity for the chemical ethylene is about 40 billion pounds per year. In 1982, ethylene sales were about 23 billion pounds. In 1983, sales were 23 billion pounds, and demand during 1984 is projected to be 30 billion pounds. In this type of business environment, market pressures, including foreign imports, will inevitably

force domestic producers to absorb the cost of the tax.

3. The "deep pocket" theory will not work.

Only 12 companies pay almost 70% of the superfund taxes currently collected. These same companies all have petrochemical manufacturing operations which represent between 5-20% of their capital assets. These companies are all profitable when considered from an overall business standpoint. However, it is unrealistic to expect the management and stockholders of these companies to continue to manufacture petrochemicals when these operations can only be expected to generate continuing losses, and are not essential to the companies' overall viability. As I previously stated, we have shut down petrochemical and derivative manufacturing operations when we have been forced to do so by adverse market conditions, leading to a significant personnel reduction of nearly 40%. It does not seem prudent public policy to exacerbate this circumstance by imposing an artificial economic burden through a massive increase in the feedstock tax.

4. The tax rates are based on economic assumptions that ignore the global nature of the petrochemical industry.

Do not forget that we are competing in a worldwide industry. We should treat our domestic capacity as a vital national asset. It produces a positive balance of trade for this country. The technological position we have worked so hard to develop in this country allows us to deliver product to international markets more cheaply than our international competition. Independent consultant studies indicate this advantage of U.S. productive capacity is on the order of 1¢ cent per pound. To burden the domestic

industry with a feedstock tax of almost 1¢ per pound would eliminate this advantage and result in the loss of this positive flow of trade dollars. Shutdowns of U.S. capacity would just assure that we export more future production capacity as resource-rich foreign countries fill the void. Already, the planned start-up of Middle Eastern plants that could export derivative products to the U.S. without paying the superfund tax places our industry under extreme pressure. Upping the feedstock rates even further will guarantee that we lose our trade edge.

5. The tax unfairly penalizes an extremely narrow industry segment.

Any law which places most of the burden for funding a national priority on 12 companies is at best grossly unfair and destructive for the taxed business segments, their employees, and the economies of the states where these businesses are located.

An analysis of available data for waste disposal sites currently on the national priority list indicates that responsibility for problems which require clean-up are much more widely distributed than the current tax burden suggests.

Considering the SIC code of companies identified as responsible parties at NPL sites:

- o Companies within the chemical and allied products industry were identified at only 18% of the sites.
- o Companies within the petroleum refining industry were identified at only

5% of the sites.

- o Over half the identifiable companies involved with NPL sites are not subject to the superfund tax. This includes companies in the lumber and wood products, electrical equipment, and electronics industries, for example.

To reiterate, we support the reauthorization of a fund to clean up abandoned dump sites. We will also support expansion of this fund if it can be shown that additional monies are required to adequately address this problem and can be spent in a responsible manner.

However, we are unable to support the continuation or expansion of a funding mechanism that places extraordinary burdens on a narrow segment of industry, which is grossly inequitable, and which will destroy an industry that provides jobs and trade dollars to this country. The abandoned hazardous site problem belongs to the entire society. Everyone has benefitted, directly or indirectly, from the savings produced by past improper disposal practices. For this reason, we must move to a broader funding base for the superfund.

In the remainder of my testimony, I would like to suggest an alternate, more equitable funding concept which avoids the adverse consequence of an increased feedstock tax.

Funding

We recommend to you today that Congress adopt for the present fund, or for an expanded fund, a dedicated gross receipts tax on all businesses filing a U.S.

corporate income tax form (1120) having in excess of \$50 million in receipts annually. In addition, we recommend that Congress provide a direct economic incentive for proper hazardous waste management by imposing a tax on hazardous wastes currently subject to the Resource Conservation and Recovery Act (RCRA).

Based on latest available Treasury Department statistics, a gross receipts tax would fall on approximately 8,200 businesses, a relatively small number of taxpayers, considering the magnitude of the proposed increase in the present bill.

The 8,200 businesses reported gross receipts in 1980 of \$3.7 trillion, a healthy basis for guaranteed revenue generation that is unlikely to decline significantly, given current and projected economic growth rates. Consequent economic dislocation of such a tax would be nearly unmeasurable. For example, using 1980 statistics, a tax rate of two one-hundredths of 1 percent on gross receipts of subject businesses would produce revenues of about \$750 million annually, a rate approximately equal to \$2 per \$10,000 in receipts. By contrast, the tax rate on petrochemicals in one leading bill (H.R. 5640) is the equivalent of 6% of the sales price, of ethylene and propylene, for example, a rate that is more than 200 times greater than that in our tax proposal. Additionally, the gross receipts tax would fall equally on foreign and domestic businesses, because any entity with more than \$50 million in gross receipts that files a corporate income tax form in the United States would be subject to the proposed superfund tax.

I might mention here that, in response to concerns raised by some who have examined our proposal, we have built into the tax an exclusion for receipts derived by U.S. taxpayers from exclusively foreign operations, for the obvious

reason that they have essentially no domestic impact.

The dedicated gross receipts tax could be applied in an administratively simple manner. Gross receipts are already reported on corporate income tax forms. It would be relatively easy to require subject corporations to compute a dedicated gross receipts tax by using data found on the existing reporting form and amending the computation schedule now used to calculate gross receipts. Addition of the dedicated gross receipts tax to the corporate income tax form would further ensure simplicity by levying the tax in a consolidated fashion: the tax would be paid by parent corporations, rather than by individual subsidiaries. Consolidated taxation also would foreclose a potential loophole for businesses which might be comprised of a host of subsidiaries that, individually, produce less than \$50 million in receipts annually.

It is important to note further that the first \$50 million in receipts for every business would be excluded.

The gross receipts tax, which would replace the current crude oil/feedstock tax entirely, would be explicitly dedicated in the statute to the financing of the Hazardous Substances Response Fund created by section 221 of CERCLA. In no way should the tax be construed to produce general revenues for the U.S. Treasury.

Furthermore, it should be emphasized that replacement of the crude oil/feedstock tax with the dedicated corporate gross receipts tax would not allow currently taxed entities to escape taxation for fund purposes. Every one of the major CERCLA taxpayers would be subject to the gross receipts tax that we have described. The amount of taxes paid by Atlantic Richfield Company under our proposal would not differ significantly from our current CERCLA tax

burden.

As currently constructed, CERCLA provides no incentives that will aid in preventing future hazardous substances problems by reducing the total volume of wastes disposed on land. Thus, the job of cleaning up leaking hazardous waste dumps may never be finished. Regulatory requirements alone do not produce adequate inducement for development and use of alternatives to land disposal of hazardous waste. Consequently, Atlantic Richfield recommends that Congress amend CERCLA to provide for a waste-end tax that would apply to any waste:

Having the characteristics identified under section 3001 of RCRA, as in effect on the date of enactment of CERCLA amendments (other than waste the regulation of which has been suspended by Act of Congress on that date), or

Subject to the reporting or recordkeeping requirements of sections 3002 and 3004, as so in effect.

Exemptions from the tax would be provided for alternative management of subject wastes through reuse, recycling, treatment, and incineration. Obviously, alternative management processes can be expected to produce some hazardous residues that will require land disposal. Such residues would be subject to the waste-end tax.

The tax would be paid by disposers. That is, in the case of on-site disposal, the generator would pay the tax. In the case of wastes submitted for off-site disposal, the tax would be paid by the disposal facility operator. We have built into our proposal a mechanism to ensure that a credit is passed back to

generators for any waste submitted for offsite disposal that is rendered benign through alternative waste management. In this way, the economic incentive for moving away from land disposal is preserved.

As a part of our submission for the record, we are providing today specific legislative language for implementation of both the gross receipts tax and the waste-end tax.

The statistics on the current and potential economic conditions faced by the petrochemical industry as a result of superfund taxation have been tested and found valid by private economic experts, including Professor William Nordhaus of Yale University. We are continuing to work with these outside experts to further define the economic penalties imposed by the feedstock tax and to test the economic viability of the gross receipts and waste-tax proposals our Company supports. We will be happy to supply you with this additional information as it becomes available.

Taken together, the gross receipts and waste-end taxes fully meet the five criteria Congress established for a workable superfund: guaranteed revenues, administrative simplicity, minimal economic dislocation, equity, and incentives for alternatives to land disposal. Indeed, Atlantic Richfield Company believes the gross receipts/waste end tax does a significantly better job of meeting the criteria than does the crude oil/feedstock tax, which falls very short on most of the criteria.

Superfund Cleanup Standards

Turning to proposals to specify superfund cleanup standards, it is our

understanding that several congressional committees have asked the Office of Technology Assessment (OTA) to develop a report on this issue. We further understand that a review is underway by the National Academy of Sciences. We urge Congress to delay any action on cleanup standards until those studies have been completed.

Underground Storage Tanks

For some time, Atlantic Richfield has been concerned about the potential problems that can be associated with underground storage tank systems. Of particular concern are underground tank leaks that could affect groundwater quality. In that regard, we place major emphasis on our voluntary leak prevention program. It is our position that liability for underground storage tanks be imposed on the owner of the tank and not the manufacturer of the petroleum product.

Furthermore, we recommend that a separate fund be established regarding leaking tanks under a wholly different statute, such as the Clean Water Act, or as a designated portion of the CERCLA fund. The administrative mechanism for responding to such releases also should be separate. If the leaking tank response problem is included in CERCLA, the liability provisions should be structured so as to distinguish between wastes, where some rationale for generator liability has been established, and materials with economic value. There is no rationale for manufacturer liability regarding non-waste materials which are not within its ownership or control at the time of the release.

Modifications to the "petroleum exclusion" in CERCLA should be carefully structured so that only fuels and other finished petroleum products such as

solvents are no longer covered by the exclusion. Crude oil and gasoline blending stocks would remain subject to the "petroleum exclusion."

We do not believe that underground tank standards should be included in CERCLA. Rather, we urge that uniform, stringent underground storage tank performance standards be authorized under another statute, such as RCRA. Specific control measures should be administratively established and be sufficiently flexible to accommodate varying installation conditions. However, the statute should mandate that the standards apply to all fuel and other finished petroleum product tanks, regardless of the financial condition or size of the owner or other factors.

Finally, the funding mechanism, administrative procedures and tank standards for fuels and petroleum products should be preemptive of state or local actions even though the federal activities as to releases of waste and other materials are not.

Citizen Suits

We are concerned with and oppose addition of citizen suit provisions to CERCLA. Effective implementation of CERCLA requires and will continue to require the exercise of great discretion on the part of enforcing agencies. The exercise of this discretion has necessarily led to the current situation involving substantial delays in site cleanups. Citizen suits can only worsen the situation.

Victim Compensation

Turning to the subject of victim compensation, Atlantic Richfield has considered the issue of compensation for exposures to hazardous substances for some time. We have concluded that passage of federal legislation to compensate persons for non-workplace exposures to hazardous substances is premature.

Conclusion

Obviously, we have addressed a number of issues that are quite complex. For the reasons stated, we cannot support proposals to multiply the feedstock tax. Simply put, increases will force a shutdown of substantial portions of ARCO Chemical Company, as well as much of the remainder of the taxpaying chemical industry. Adoption of the gross receipts/waste end tax can ensure a steady stream of revenues for cleanup of abandoned hazardous waste dumps with a minimum of economic dislocation. We urge your careful consideration of our proposal as an affirmative method for solving a critical environmental problem in a manner that spreads the costs more equitably across all of society.

Atlantic Richfield Company



CHEMICAL MANUFACTURERS ASSOCIATION

STATEMENT
ON BEHALF OF THE
CHEMICAL MANUFACTURERS ASSOCIATION

BEFORE THE
COMMITTEE ON ENVIRONMENT
AND PUBLIC WORKS
UNITED STATES SENATE
ON
SUPERFUND REAUTHORIZATION

February 27, 1985

The Chemical Manufacturers Association is a non-profit trade association whose member companies represent more than 90 percent of the productive capacity for basic industrial chemicals in this country. In several appearances before Congressional committees since November of 1983, we have stressed both our strong support for an effective national program to clean up problem waste sites, and our commitment to play a cooperative and constructive role in the process leading to Superfund reauthorization. We are pleased to present our views on Superfund reauthorization.

We believe that Congress should reauthorize Superfund by (1) determining realistically what EPA's annual funding needs will be, and providing for such levels; (2) deriving these funds from more broadly based mechanisms than the tax structure of the current law; (3) providing this funding for a five-year period so the needs can be re-examined; and (4) re-enacting the current law with minor modifications.

In this statement, we wish to underscore our position that Superfund be reauthorized promptly and that remedial actions proceed at an accelerated pace. In Part I of this statement, we explain why remedying significant environmental problems at inactive hazardous waste sites should remain the focus of Superfund, and why expanding the scope of Superfund beyond this

central purpose will be counterproductive. In Part II, we discuss our thoughts on how to quicken the pace of Superfund remedial action by encouraging settlements. The public interest is disserved by protracted suits in which the cost of litigation approaches remedial costs, scant progress is made toward cleanup, and too little attention is devoted toward achieving prompt resolution of the hazardous waste site problem. In Part III, we discuss proposals to increase CERCLA taxes and their potential economic consequences for the chemical industry. Current CERCLA feedstock taxes are already narrowly based, inequitable, and so structured that the taxpayer must absorb most of their cost rather than pass it along into the marketplace.

I. Expanding The Scope of Superfund Would Divert Us From The Cleanup Program

Aside from the need for new funding and adjustments to the funding structure, we believe that the Superfund law as now written provides a good, workable framework for emergency response actions and the national waste site cleanup program. We are aware of widespread frustrations that the waste site cleanup program has not appeared to be moving fast enough. We are as anxious as anyone to get the hazardous waste problem behind us.

Despite the initial start-up difficulties with the program, we believe that any fair analysis indicates that EPA is now making better progress. In our testimony before the Senate

Environment and Public Works Committee on May 16, 1984 (statement of Edwin C. Holmer), we explained how EPA's momentum has been building steadily over the last two years and how statistics show the program now escalating at a good rate. Recent testimony by EPA Administrator Lee Thomas shows this steady and rapid buildup even more dramatically. By the end of 1984, cleanup activity was underway at 753 sites, including 387 with engineering studies and 134 under construction. By the end of this September, EPA projects 1,073 sites with cleanup activity, including 494 with engineering studies and 163 under construction.

Because the program is now beginning to produce and EPA is "on track" under the currently drafted law, we think it would be inappropriate to encumber the process with many new significant amendments that institute new uses for fund money, other than for inactive hazardous waste sites, and which will only disrupt the progress EPA is making. We will describe below some of our principal concerns.

A. Focusing on Inactive Hazardous Waste Sites

The principal focus of Superfund efforts should be on the cleanup of inactive hazardous waste sites. It seems clear that Congress intended Superfund to focus on priority hazardous waste

sites. ^{1/} The National Priorities List (NPL) was designed to provide a focus for federal efforts to clean up such sites. We therefore strongly support legislation such as that proposed by the Administration which would assure that Superfund dollars are used to clean up hazardous waste sites.

By concentrating its efforts on hazardous waste sites, EPA has begun to make significant progress. However, there have been recent signs that this progress might be diverted by a new focus on many more sites with unknown implications for the future of the program.

For example, EPA recently requested comments in its NPL proposal about the advisability of using Superfund resources to clean up six "South Central Oahu" sites in Hawaii. These sites are proposed for listing on the NPL because they may be contaminated by the agricultural use of pesticides. EPA has acknowledged that pesticides are widely used throughout the country, and there may be many other sites similar to the Oahu sites. We submit that EPA should not divert Superfund resources to the treatment of large aquifers. In fact, the pesticide liability exemption of Section 107(i) is evidence of a Congressional expectation that significant fund resources not be devoted to pesticide contamination.

^{1/} See the preamble preceding Superfund's enactment clause, 94 Stat. 2767, Publ. L. 96-510 (December 11, 1980).

Similarly, Congress did not intend to use the fund for extensive remedial action at mining sites. The EPA Administrator should have authority to respond if there is an emergency public health threat posed by mining wastes. However, this authority should not be construed as a broad mandate to clean up mining sites.

We also urge that fund resources not be used to perform remedial work on releases of "pollutants or contaminants." Congress gave EPA the authority to respond to releases of hazardous substances and pollutants or contaminants. They did not, however, give EPA authority to recover costs for cleanup of pollutants or contaminants--only for cleanup of hazardous substances. Money in the fund should be conserved for serious public health threats and in remedying real problems posed by hazardous substances in waste sites. Channeling money into lesser matters is an inappropriate use of fund resources.

In addition, we are concerned about provisions in S.51 that would make municipal landfills eligible for 90 percent fund financing of cleanup activities. State or local government owners of municipal landfills should share at least 50 percent of the cleanup costs even if they did not operate them. EPA estimates there are 36,000 municipal landfills that may need remediation. This would impose a major drain on the fund unless states are willing to pay their fair share of the remedial costs.

Finally, permanent relocation should be used very judiciously due to its high cost. We recommend that such relocation be considered only where there is a true health emergency related to hazardous waste at a site. We do not support instituting relocation as a routine removal action.

We want to emphasize that we are committed to legitimate fund expenditures that lead to fully adequate site cleanup and appropriate emergency response actions. Going beyond these important tasks, however, leads toward an uncharted federal program with numerous goals and almost infinite possibilities of expansion. If we are to achieve the goal of cleaning up problem hazardous waste sites in an expeditious manner, then Superfund resources must be focused on priority hazardous waste sites and true emergency needs.

B. Health Insurance Funded By Superfund

Providing compensation for chronic diseases in America is a serious subject, and one that deserves careful consideration by Congress. Because of the broad scientific, social, economic and legal issues involved, however, Congress should not treat this matter simply as an "add-on" to the Superfund hazardous waste site cleanup program. In our May 16, 1984, testimony before this Committee, we explained why, in light of the current state of scientific evidence and the need to avoid diverting Superfund

from waste site cleanup, it would be inappropriate for Congress to legislate programs for "victims' compensation" as part of the Superfund. In passing H.R. 5640 last year, the House wisely rejected any such proposals. The House in fact defeated by a vote of 200-159 an amendment to fund a compensation scheme out of Superfund. ^{2/}

The bill approved in 1984 by this Committee established a so-called "victim assistance demonstration program." This provision would provide Superfund money to finance a five state insurance program for persons exposed to hazardous and non-hazardous substances. EPA would select the five states and determine the grant money for each state. The bill introduced this session, S.51, reserves a section for victim assistance, although specific provisions are not presented.

Enactment of a victim compensation program would be a serious mistake. It would divert needed resources from the cleanup of hazardous waste sites. Moreover, it is likely to develop into an uncontrollable entitlements program that would be extremely costly for the entire nation. Once a federal right to compensation is established, history indicates that it is unlikely that Congress would be able to limit the program to five

^{2/} See Congressional Record of August 10, 1984, at H8892 to H9006.

states or restrict compensation to a manageable and reasonable benefits program. ^{3/}

Superfund should not be diverted from its primary purpose of cleaning up hazardous waste sites. Our goal should remain preventative, to reduce the exposure of Americans to inactive hazardous waste sites on an accelerated basis. Compensation programs should not be in competition for Superfund waste site cleanup money.

II. Solving Settlement and Enforcement Issues so as to Accelerate the Pace of Remedial Action

The current EPA approach to Superfund relies on the settlement process to encourage private party cleanup, along with fund financed remedial work and suits to recover the government's expenditures. EPA also has authority under Section 106 to compel responsible parties to clean up waste sites. The goal of expedited cleanup is usually better served, however, by a speedy and responsible settlement process. The factors are complex, but several key components could speed the process and make the whole program more efficient. To achieve these goals, we recommend the following:

^{3/} This is amply demonstrated by the history of the Federal Black Lung Act. Under this statute, a compensation program for miners expanded from a predicted overall cost of \$200 million to an actual cost of \$2 billion a year.

- ° EPA should first identify all major contributors at a site and enter into negotiations with those who are willing to settle quickly.
- ° Next, EPA should use the fund to pay for the remaining or absent shares, e.g., those who are either unwilling to settle or are not available for settlement.
- ° Lastly, EPA should vigorously pursue non-settling parties to recover the costs of the fund in acting on behalf of the recalcitrant parties.

We believe the proposals of the Administrative Conference of the United States offer sound principles for improving the settlement process. According to these proposals, EPA should place greater emphasis on the negotiation of voluntary cleanups at hazardous waste sites. EPA is also encouraged to exercise greater flexibility in situations where cleanup arrangements are being negotiated rather than litigated. This includes use of fund money to pay for absent shares and apportioned liability based on the volume and nature of wastes at a site rather than full joint and several liability for cleanup. The Administrative Conference notes that this would provide an incentive for cooperating parties to join promptly in an agreement, and would free agency resources to pursue intransigent parties. We believe these recommendations, which are endorsed in Section 123 of S.51, deserve the support of Congress.

We also urge Congress to endorse a "right of contribution" under CERCLA. Under common law, a party is normally entitled to contribution from other liable parties where the party has been sued for more than his fair share of responsibility. Some proposals which surfaced last year would have created an express

right of contribution in CERCLA, ending the debate over whether the Superfund law affords such contribution. These proposals, however, also precluded a party from obtaining contribution until after the litigation is completed, or until a settlement is made. CMA strongly opposes provisions that would prevent the joinder of additional responsible parties prior to completion of the litigation.

In addition, parties that settle want protection against suits by non-settlers. In some Superfund cases, parties have settled with the government only to find themselves sued for contribution by non-settlers. Congress should provide that a good-faith settlement bars any suit for contribution by non-settling parties.

In summary, voluntary settlement will have to achieve a substantial portion of the site cleanups in order to make the continued progress the public expects. Steps to promote voluntary settlements should be encouraged by Congress to quicken the pace of cleanups and to avoid burdensome and costly litigation which will drain both private and governmental resources.

III. A. Economic Impacts of Superfund Taxes on Taxed Industry Should be Minimized

Superfund taxes and other cleanup revenue sources are levied to ultimately defray cleanup costs for hazardous waste disposal problems caused by unidentified or insolvent parties. In the absence of allocated direct responsibility among parties at waste

sites, proposed funding sources for cleanup costs usually are manufacturers of related substances, managers of related waste disposal practices and government entities that have allowed, encouraged or licensed unsatisfactory disposal practices. Funding from these sources would be generated through mechanisms such as the CERCLA feedstock tax, various waste-end generation or disposal tax proposals and general revenue. Each source of revenue has a limited ability to raise revenue beyond which a negative economic impact undermines the tax base by threatening the viability of the taxpayers or diverting general revenue funds from other essential government services. Each source should contribute to the hazardous waste trust fund but each should be limited. CMA has proposed a \$307 million/year feedstock tax (current CERCLA levels) and \$307 million/year waste disposal tax at \$50/dry weight ton as the maximum burden that industry can bear without significant negative economic impacts as discussed in the following paragraphs.

In pragmatic terms, we acknowledge the difficulty in developing a tax that is equitable in all regards. The many industries and federal, state and local governments involved in Superfund sites demonstrate the societal nature of this problem. By the same token, Superfund is a liability statute, so there is some equity in the allocation of costs for those sites on the NPL with identifiable responsible parties. For the sites the fund must clean up, the costs should be borne by a much broader segment of society than simply the chemical industry.

Examining EPA's NPL list, Final Rule, 1983, the chemical industry represents 17 percent of those who disposed of hazardous substances at sites on the NPL (49 percent of those who disposed of hazardous substances at NPL sites are unknown). Eleven other industries are also represented as disposers although in smaller percentages. An examination of the NPL list by site owners shows that only about 15 percent were attributable to the chemical industry. We believe that there is sufficient information available to show that many segments of industry and government contributed to this problem. This evidence supports the original concept of having general revenues as part of the funding mix. We discuss the need for general revenues in more detail in Section III (B)(3).

Impact of Increased CERCLA Feedstock Taxes

Legislative proposals to increase CERCLA funding which rely principally on increasing feedstock taxes three to five times the current rates would cause plant shutdowns, loss of export potential, lost jobs in the chemical industry and infrastructure and erosion of the tax base. CERCLA taxes at the current levels are narrowly based, inequitable according to EPA analysis ^{4/} and so structured that the taxpayer must today absorb most or all of the tax rather than pass it along into the marketplace. The

^{4/} EPA 301 (a) (1) (G) study page ES-4.

economic impact of CERCLA feedstock taxes has been to consume a substantial share of pre-tax earnings of the taxed chemical sectors. The proposed threefold to fivefold increases would exceed the earnings of taxed chemicals. Competitive conditions already foreclose investment for new facilities to manufacture taxed chemicals. Loss of earnings would further jeopardize continued operation of existing chemical manufacturing facilities while threatening jobs and export potential.

Current CERCLA taxes are narrowly based. They are imposed by statute on 42 chemical substances and petroleum sold, used, imported or exported by 496 ^{5/} taxpayers. In fact, the bulk of the chemical feedstock taxes are paid on eight petrochemical feedstocks (primary petrochemicals) and five inorganic chemicals and by less than 30 chemical manufacturers.

CERCLA feedstock taxes are inequitable according to EPA's analysis. The tax does not distinguish between hazardous and non-hazardous use of taxed chemicals nor does it reflect the environmental risks of the taxpayer's waste management practices. Compared with the current CERCLA tax distribution of 70 percent to primary petrochemicals, that 70 percent share would diminish to 31 percent ^{6/} if distributed in relation to those substances'

^{5/} IBID page 2-4

^{6/} IBID page 4-9

contribution to waste problems in 691 Superfund sites on the National Priority List.

CERCLA taxes are not passed through in the marketplace.

Feedstock taxes were presumed by CERCLA's authors to be equitable because they were thought to be passed along in the manufacturing process to impact on all potentially hazardous substances. From the perspective of 1980 economic conditions that existed when CERCLA was crafted, pass-through might have been possible. For instance, primary petrochemical demand grew during the 1975-79 period at 2.4 times the GNP growth rate and industry was hard pressed to meet demand. Full cost recovery, including costs associated with new taxes were likely in that competitive environment of temporary shortages. However, demand from 1979 through 1983 decreased at 2.7 percent per year. This change in demand coupled with extensive new capacity installed in the 1979-80 period led to worldwide overcapacity. Primary petrochemical prices dropped sharply and prices for foreign petrochemicals tended to set prices in foreign and domestic markets. The impact of these foreign prices capped prices for U.S. products and prevented pass-through of CERCLA taxes. That condition still exists today despite improvement of U.S. competitiveness through surgery on inefficient manufacturing facilities and manufacturing innovation.

The difficulty of cost pass-through becomes even more apparent when chemical products in international trade are examined. The taxed feedstocks themselves have diminimus trade.

It is their downstream derivatives which enter into commerce. The case of ethylene is a good example. Ethylene production in 1983 accounted for over 13 percent of all petrochemicals manufactured. ^{1/}

Yet the exports of this material were virtually non-existent accounting for less than 0.01 percent of all petrochemical exports. Ethylene is exported as its downstream products such as polyethylene resins. Polyethylene resins are categorized by the Department of Commerce in SIC 2821, "plastic materials, synthetic resins". When downstream products such as these plastic materials enter international commerce, they are competing against products manufactured in countries where no feedstock tax exists. Accordingly, any attempt to pass through the cost of a feedstock tax would render the U.S. downstream product less competitive.

A similar condition exists with regard to imports of chemicals. As in the case of exports, it is not the feedstock chemicals which are moving in international commerce, but their downstream derivatives. U.S. purchasers of these downstream products are free to buy either domestic or imported material. Once again, the U.S. producer of these downstream products is prevented from passing through the cost of the feedstock tax by market forces. The imported material was manufactured from feedstock which had no tax placed upon it. Continuing to use SIC

^{1/}Synthetic Organic Chemicals, U.S. Production and Sales, 1983, U.S. International Trade Commission.

2821 as the example, the Department of Commerce data show a dramatic increase in market penetration by imports. From 1980 to 1983, the value of imports almost doubled from \$247.4 million dollars to \$468.7 million dollars. Imports in 1984 for this product group totaled \$677.5 million.

It is not just the product sector defined by SIC 2821 which is exhibiting a decline in trade balance. The positive trade balance for the entire chemical industry has declined from \$15 billion in 1980 to \$10.6 billion in 1983, and the decline appears to be accelerating. As is the case in SIC 2821, this is being caused by both declining exports and increasing imports, and an increase in the current feedstock tax will only worsen these problems.

The economic impact of CERCLA taxes has been to consume a large share of profits on the few chemicals subject to the feedstock tax. Proposed increased tax rates to accommodate an expanded Superfund will eliminate earnings completely. CERCLA feedstock taxes have been equal to 1.2 to 1.4 percent of primary petrochemical sales value. Increasing the tax rates by 3.43 times as proposed in EPA's feedstock tax option 1 ^{8/} would increase taxes to 4 or 5 percent of product sales value on products whose pre-tax earnings as a percent of sales have

^{8/} IBID Exhibit 4-1, page 4-2

generally been less than 4 percent of sales. Similarly, the feedstock tax option of HR 5640 as passed by the House in 1984 would bracket a range of 4 to 6 percent of sales. A consultant's study ^{9/} evaluating HR 5640's funding options, coupled with manpower relationships for the petrochemical industry by Arthur D. Little lead to the following conclusions:

- ° Feedstock taxes are not borne by foreign competition and the result will be losses in both export and domestic markets.
- ° The margin between primary petrochemical costs and prices is inadequate to fully cover operating costs for a typical petrochemical plant today and does not provide the incentive for new plant investment and job creation in the future.
- ° Excessive Superfund taxes would eliminate or jeopardize an additional 30,000 jobs in the petrochemical industry and can cause 1 million jobs in downstream dependent industries to rely upon foreign petrochemicals.

These economic impacts are confirmed by independent government agencies including the Congress' Office of Technology Assessment (OTA) in a statement filed September 10, 1984 with the Senate Committee on Environment and Public Works.

Waste-End Revenue Should Not Exceed \$307 Million/Year

CMA assessed industry's ability to pay waste-end taxes and found that taxes in excess of a \$50/dry weight ton disposal tax

^{9/} Reference DeWitt & Co. study

would have a negative impact on taxpayers and cause tax base deterioration. Disposal taxes on an "as is" basis were found to be unsatisfactory because they discriminate against environmentally sound disposal of highly dilute streams containing little hazardous waste and because they can lead to interpretations that could eliminate all earnings of otherwise solvent chemical companies. In one such instance, the waste disposal tax of H.R. 5640 as passed by the Energy and Commerce Committee could have levied taxes of \$2 billion/year against a single company. Taxes on waste generation are economically unsound because they overlook the significant industry expenditures for treating or recycling generated waste to make it environmentally harmless. Therefore, economic impacts of tax options other than the \$50/ton dry weight disposal tax could alter otherwise sound waste disposal practices or induce hardships that discourage domestic manufacture of essential industrial products.

B. Funding Mechanisms to Finance the Superfund Site Cleanup Program

We believe that an effective waste site cleanup program can be responsibly financed with a balanced combination of special industry taxes, general revenue contributions, cost recoveries from responsible parties, interest on trust fund accumulations, and standby borrowing authority. In brief, our proposal would extend the current Superfund feedstock taxes at current levels for an additional five years. Moreover, we propose that Congress

adopt a new tax on the disposal or long term storage of hazardous wastes at rates equivalent to \$50 a dry weight ton. These special taxes on industry would raise over \$600 million annually. The balance of anticipated Superfund spending needs would be provided by general revenues, cost recoveries from responsible parties, interest and borrowing.

1. Feedstock Taxes

Earlier, we discussed the current feedstock tax and the severe economic impact of increased feedstock taxes. We recognize, however, that it is important to provide a stable base of funding for the CERCLA program for the next five years. CMA has, therefore, endorsed continuation of the feedstock tax, at current levels, for five more years. This would raise approximately \$307 million per year.

2. "Waste-End" Disposal Tax

To support EPA's anticipated annual spending levels, more than \$307 million from the feedstock tax will be needed. To reach another increment equivalent to the feedstock tax, we support a national tax on hazardous waste disposal at the fixed rate of \$50 per dry weight ton (or equivalent). Such a tax would, among other things:

- ° produce revenues of the magnitude the current feedstock tax is designed to produce;
- ° produce broader distribution of tax liabilities among industrial categories and a more logical relationship to hazardous waste disposal activities; and

- ° provide incentives where appropriate by
 - 1) reducing the amount of waste generated, and
 - 2) utilizing any technologies to recycle, reuse, neutralize, treat, incinerate or otherwise destroy hazardous waste.

It is important to stress that we strongly oppose a waste-end tax at any rate higher than a \$50 per dry weight ton equivalent. At any higher rate, the adverse economic impact on many of our members becomes unacceptable.

Our proposed combination of feedstock and waste-end taxes still imposes the major funding burden of the waste site cleanup program on the chemical and petrochemical industries. Because so many other industries have contributed to waste disposal in the past, we believe this proposed combination is as much as our industry can fairly be expected to contribute on an annual basis.

3. Balance from General Revenues, Interest, Cost Recoveries, and Borrowing

The two types of industry taxes outlined above at the levels we indicated -- approximately \$307 million per year from feedstock and \$307 million per year from the disposal tax -- will support EPA's projected annual spending needs. This is because contributions of the general federal revenue share, interest on unexpended fund balances, and cost recoveries secured by EPA from responsible parties after it has spent fund money for cleanups should easily provide the balance.

We believe a substantial general revenue contribution to the fund is appropriate for reasons of equity and sound public policy. The problems associated with inactive hazardous waste sites reflect more than 100 years of industrial development in the Nation. Hazardous wastes have been and will continue to be generated by a wide range of industries, business concerns, Government agencies and defense installations, municipalities, and scientific facilities. The problem is societal in scope and the mechanisms for coping with it should reflect its societal nature, just as the benefits of resolving the problems will inure to all elements of the country. As Congress recognized when it enacted Superfund in 1980, only through the use of general revenues, both state and Federal, can this societal responsibility be fairly discharged.

We are extremely disappointed that the Administration has decided to not include any general revenues in its Superfund proposal. We urge Congress to reaffirm the use of general revenues when it reauthorizes Superfund.

EPA projections indicate that it expects to receive 30 percent of abandoned site cleanup costs through cost recoveries. Even if only \$700 million per year is spent from the fund for cleanups, there would be \$210 million in cost recoveries per year at the 30 percent rate. Thus, our estimates displayed below as to cost recovery and interest are probably over-conservative.

Since it is likely that peaks and valleys will occur in EPA's spending requirements for site cleanup, and in annual levels (though not in overall amounts) of cost recoveries from responsible parties, we also recommend that the Agency be given the authority to borrow up to \$350 million annually to assure level funding throughout the five year period.

Any amounts borrowed could be amortized over a 10-year period and then repaid from Superfund cost recoveries from responsible parties. It should be noted at this point that these responsible parties are liable not only for the actual expenditures of site cleanup, but also for interest from the date of the EPA expenditure. Thus, any added debt service charges from this financing would be wholly borne by responsible parties. With this added borrowing authority we do not believe there will be any emergency funding needed for site cleanup activities over the next five years that require higher levels of taxation.

The following table shows how our proposed funding mechanism would match EPA spending needs of up to \$1 billion per year:

(All figures are stated in millions per year)

	\$307	feedstock taxes
+	307	waste disposal tax
	<u>176</u>	general federal revenues
	\$790	total funding
+	<u>\$210</u>	cost recoveries and interest
	\$1000	annual EPA spending

It should be noted that this annual total does not reflect all expenditures that will be devoted to cleanup of NPL sites. EPA estimates that 50 percent of these sites will be cleaned up by responsible parties. EPA will not have to spend Superfund dollars for these sites. Thus, almost \$10 billion will be spent by industry over the life of the program for NPL site cleanup in addition to what industry pays in Superfund taxes. Adding this total to the \$11.7 billion EPA spending needs figure, we see that over \$20 billion will be devoted to cleanups.

4. Proposal for a Workable Waste Disposal Tax

CMA supports a national waste disposal tax at a rate equivalent to \$50 per dry weight ton to provide \$307 million per year. Such a tax will broaden the base of the current funding scheme and will provide valuable additional incentives for the safe handling and disposal of wastes in the future. We again stress, however, that any waste end tax above \$50 per dry weight ton would impose an unacceptable economic burden on the chemical industry.

We believe there are several basic requirements for a workable and effective waste-end revenue system. First, there must be a clearly defined taxable substance. Second, there must be a definite taxable event. Third, there must be a verifiable record of transactions and events to provide the audit trail for

enforcement and collection. We have, in fact, drafted statutory language for a system which meets all of these requirements.

We note that it is especially important to tax waste disposal on a dry weight equivalency. If taxes are assessed simply on a "wet" weight basis, there will be serious distortions of waste management practices. For example, such a system would greatly favor landfill of hazardous waste over other methods of waste disposal. Thus landfilling, the method of waste disposal which has been directly related to the Superfund site problem, would pay significantly lower taxes than would other more environmentally acceptable disposal methods.

Assessing the tax on dry weight equivalency would treat all methods of disposal in a neutral manner and would preserve the strong environmental incentive that is created by a tax on waste disposal. If the tax is assessed on the dry weight equivalency of hazardous waste, the tax would be assessed on the actual content of hazardous material disposed or deposited for long-term storage.

Determining dry weight is a common, routine analytical procedure. Dry weight is the weight of a substance after removing the weight of water. One method for doing this is referenced by EPA in 40 CFR Part 136. Moreover, the post-closure liability tax which is now in place under CERCLA is imposed on a dry weight basis. 28 U.S.C. 4681(b). The experience developed by the

Internal Revenue Service in collecting the post-closure tax would apply here.

The operator of the disposal or storage site should be designated as the taxpayer. The operator is the person who performs the taxable event and is currently obligated to maintain disposal and storage records. These records which apply to owners and operators of both on-site and off-site facilities are described in EPA's RCRA regulations. The most important of these records is the operating log which contains a description and quantity of each hazardous waste received and the method and date of its treatment, storage or disposal at the facility. By designating the facility operator as taxpayer, the number of taxpayers is limited to fewer than four thousand site operators rather than more than 100,000 generators.

The disposal site operator has an established billing system through which the tax can be directly billed to the specific generator responsible for creating the hazardous waste. This simplifies the tax mechanism and provides a direct incentive to the generator to reduce or eliminate waste disposal.

When CMA first proposed the enactment of a hazardous waste disposal tax, some expressed concern that state experience would substantiate that a tax on hazardous waste disposal was an unreliable source of tax revenue. Since that time, however,

there has been substantial proof that a tax on the disposal of hazardous waste does provide a reliable revenue base.

First, a September, 1984 EPA survey of state experience with waste disposal taxes confirms that state waste taxes were at least as effective and efficient in producing anticipated revenue over the survey period as the Federal Superfund feedstock taxes. In this respect, it should be noted that over the course of the past year EPA has moved from outright opposition to the use of any waste end tax to qualified support in its recent Section 301 (a) (1) (G) study for waste end tax measures as appropriate for inclusion in a Superfund funding program. Moreover, the Administration has now submitted a proposal that recognizes the concept of a waste end tax. We have major problems with the way that tax would be applied, however. We are particularly disturbed by the use of a wet weight basis rather than a dry weight basis and the application of the tax to those who responsibly and effectively treat their waste, such as in waste water treatment facilities.

Second, IRS collection data confirm that taxpayers are presently paying Federal postclosure liability taxes based on the annual disposal of about 4 million dry weight tons of hazardous waste. Moreover, these taxes are being paid without significant IRS guidance or enforcement efforts and after several Congressional leaders have proposed retroactive repeal of these taxes. Under these circumstances, the postclosure data can be viewed as

substantiation of at least the minimum revenue base of a more expansive tax on the disposal and long term storage of hazardous waste.

Third, the September, 1984 OTA statement before this Committee contains a lengthy discussion of the virtues of a federal waste disposal tax. See OTA Statement, pages 9-16. While we do not agree with the higher range of the OTA Statement revenue projections on a waste end tax, we believe that the OTA Statement provides solid support for the reliability and workability of such a tax.

STATEMENT OF
THE CHLORINE INSTITUTE, INC.
ON S. 51, SUPERFUND IMPROVEMENT ACT OF 1985

BY DONALD S. PIRKLE
VICE-PRESIDENT AND GENERAL MANAGER
INORGANIC CHEMICALS DEPARTMENT
DOW CHEMICAL U.S.A.
MIDLAND, MICHIGAN

BEFORE THE SENATE
ENVIRONMENT AND PUBLIC WORKS COMMITTEE

WASHINGTON, DC
FEBRUARY 25, 1985

Mr. Chairman, Members of the Committee.

My name is Donald S. Pirkle, and I am Vice-President and General Manager of the Inorganic Chemicals Division of Dow Chemical, USA. I am also Vice-Chairman of the Chlorine Institute, and it is on behalf of the Institute that I am submitting this testimony. The Chlorine Institute is composed of producers, packagers and distributors of chlor-alkali products. As many of you know, chlorine is the third largest chemical revenue producer for Superfund, and as such we are uniquely qualified to comment on S. 51, the Superfund Improvement Act of 1985.

While the Chlorine Institute supports reauthorization of the Superfund program, there are a number of specific provisions in S. 51 and some of the proposed amendments to S. 51 which have the potential for negatively affecting this industry's ability to function efficiently in the years ahead. We therefore urge this Committee's careful consideration of our concerns and comments.

SUPERFUND IMPROVEMENT ACT OF 1985

S. 51 is substantially identical to the Superfund legislation reported out by this Committee by a 17 to 1 vote last year. The legislation contains a number of provisions designed to protect the public health and safety -- provisions which, if enacted, will help prevent hazardous waste-related injuries.

Among other requirements of S. 51, health assessments would be conducted at sites listed on the National Priorities List. A more effective program of public notification would be established. Additionally, alternative drinking water supplies would be provided if waste site conditions nearby warrant such action. In short, S. 51 takes steps to prevent any erosion in the public health caused by hazardous waste dumps.

FUNDING LEVEL

Senator Stafford, Chairman of this Committee, has introduced an amendment to S. 51 which contains the critical elements of a Superfund revenue proposal. Senator Stafford has indicated that a funding level of \$7.5 billion over five years is the appropriate level for Superfund. While not endorsing any overall level of funding for EPA's Superfund mission, the Chlorine Institute notes that the financing amendment proposed to S. 51 would actually raise more than \$7.5 billion.

EPA has testified that it can productively spend no more than \$1 billion a year for the five-year span of the reauthorized measure. Therefore, we need not tax certain non-hazardous chemicals to finance the program. This Committee can take advantage of what has been learned over the past five years regarding the relative hazards of the listed feedstocks, and can remove certain chemicals as appropriate.

The Chlorine Institute has undertaken an extensive review of two chemicals produced by our industry, caustic soda and caustic potash (sodium hydroxide and potassium hydroxide, respectively), as co-products of chlorine production. Our study indicates that these relatively innocuous chemicals do not belong on the list of feedstock chemicals, and should be delisted.

Caustic soda and caustic potash are used in everything from the production of cotton cloth to food processing. They perform valuable services in the control of both water and air pollution. The appearance of these compounds at waste sites on the National Priority List or the subject of immediate removal actions is minimal. For example, the Environmental Protection Agency admits that caustic potash was not detected at any of the more than 880 sites evaluated under the Hazard Ranking System, and it has not been involved in any of more than 500 immediate removal actions. Similarly, caustic soda appeared at less than 1 percent (.79%) of sites evaluated under the HRS program. Immediate removal actions undertaken by EPA have not, as a rule, been directed to caustic soda contamination. In fact, the presence of the caustics at waste sites is more consistent with their use as acid neutralizers.

The United States Senate now has the opportunity to eliminate the Superfund feedstock tax on the caustics. I urge you to recognize the beneficial role the caustics fulfill in our society. I ask you to consider the disastrous impact any significant increase in the feedstock tax on these chemicals will have on the

chlor-alkali industry. The future of American jobs and a crucial American industry depend on revision of the feedstock chemical lists to exclude sodium hydroxide and potassium hydroxide.

WASTE-END TAX

The proposed financing amendment to S. 51 relies in part on a waste-end tax. The Chlorine Institute supports the concept, and in particular endorses a waste-end tax which spreads the Superfund tax burden equitably among all hazardous waste generators, transporters and disposers and discourages harmful disposal practices.

In order to properly spread this burden it is essential that the waste-end tax adopted by Congress provide little or no fluctuation in the feedstock tax rates. Neither the chlor-alkali industry nor the chemical industry in general could withstand the double blow of high feedstock tax rates and high waste-end tax payments.

It is also essential that a waste-end or similar tax program encourage the use of alternative disposal technologies. The potential dangers posed by long-term storage and land disposal must be avoided, and new and safer methods sought. Without necessarily endorsing its proposed tax system, Senator Moynihan's waste-end bill, S. 14, provides an economic incentive to employ the lower-risk disposal technologies currently available. The Chlorine Institute endorses the concept of a waste-end tax program which spreads the financial burden of Superfund and encourages substitute disposal methods.

FEDERAL CAUSE OF ACTION

Finally, we wish to comment on the federal cause of action proposed to be included in S. 51, as well as the related concept of a victim's compensation program. The Chlorine Institute is not opposed to compensating the victims of hazardous waste exposure -- we believe, however, concerned that any such compensation should only come from those responsible for the injuries.

It is the position of the Chlorine Institute that a victim's compensation program should not be included in the Superfund reauthorization legislation. A victim's compensation program funded as part of Superfund will require the Environmental Protection Agency to assume a heavy administrative burden. Funding for the Agency's critical clean-up and prevention mission will be diverted, and indeed the very progress of site clean-up will be impeded. In short, the protection of the public health and the environment will be better served through existing State law or by consideration of a federal cause of action or victim's compensation apart from Superfund.

SUMMARY

The Senate Environment and Public Works Committee will soon begin its mark-up of S. 51. The Superfund legislation reported out of this Committee will become the standard against which all

subsequent Superfund proposals will be measured. It is therefore crucial to this Nation, to industry, and to the American people that a well-reasoned, equitable Superfund measure is enacted.

A Superfund program responsive to the needs of industry and the public can be attained by this Committee's careful consideration of the appropriate funding level and financing alternatives, including a waste-end or similar tax. Consideration of a federal cause of action or victim's compensation proposal outside the specific context of Superfund will ensure that the public health and the environment are fully protected. The admirable goals set by the 1980 CERCLA legislation can be achieved, and that achievement need not come at the destruction of the chemical industry.

Thank you for the opportunity to submit these comments for the record.

For the Committee's convenience, I have attached to my testimony a copy of the Chlorine Institute's position paper on Superfund reauthorization.

CI POSITION PAPER

of the Chlorine Institute, Inc.

February 5, 1985

THE CHLORINE INSTITUTE, INC.

POSITION PAPER ON SUPERFUND REAUTHORIZATION

The 99th Congress must reauthorize the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), or Superfund, this year. Chlorine producers, who now constitute the third largest group of chemical taxpayers to Superfund, are significantly affected by the provisions of Superfund and pending reauthorization legislation. By the time the taxing authority of the current act expires, U.S. chlor-alkali producers will have spent over \$155 million for the taxes on chlorine and caustic alone, or more than \$85,000 daily. A major proposal considered by the 98th Congress would have had chlorine-caustic producers paying over a third of a million dollars a day -- roughly four times the current burden!

The U.S. chlor-alkali industry is in a depressed condition. Its share of world chlorine production which once was two-thirds has diminished to less than one-third today. Approximately 12 percent of U.S. chlorine production is exported as derivatives, and competes in the world market with untaxed materials. This competition effectively prevents the pass-through of feedstock taxes by U.S. producers. The industry is experiencing an acceleration of these trends caused by such factors as significant energy cost increases, the need to absorb the heavy

costs of pollution control and other environmental regulations, as well as the development of competing overseas businesses. Uneconomic operating rates -- now still only about 70-75 percent of chlorine nampelate capacity -- have contributed to the discontinued operation of twelve plants since 1980. These closures represented a loss of almost 4,000 tons per day chlorine capacity and creating substantial unemployment.

REAUTHORIZATION OF CURRENT LAW

The Chlorine Institute, Inc. is a trade association of chlorine/caustic producers, and is uniquely qualified to comment on the critical Superfund reauthorization issues. The potential impact of this year's Superfund reauthorization may very well exacerbate an already depressed industry. Thus, a number of Superfund issues are of specific concern to the Chlorine Institute.

The Chlorine Institute strongly supports the reauthorization of the Superfund program. All members of the Institute recognize that cleanup of priority hazardous waste sites must proceed rapidly and efficiently in order to eliminate the potential dangers posed to health and the environment by the existence of these sites. The Superfund law should be reauthorized as soon as practicable so that there will be no loss in momentum in this vital clean-up program.

REAUTHORIZED SPENDING LEVELS

A Superfund reauthorization level which exceeds EPA's stated annual needs could have the paradoxical effect of retarding EPA's clean-up activity, not speeding them up (testimony of EPA Administrator William Ruckelshaus, March 15, 1984). Overfunding would further deplete industry's capital resources and retard reinvestment, modernization and research. We believe that EPA should be provided with the funds needed to productively carry out its Superfund mission for the next five years.

FUNDING MECHANISM

The current Superfund program is financed almost entirely by a special industry tax. This tax, imposed on the sale of certain petroleum products, organic and inorganic chemicals, is commonly referred to as the "feedstock" tax. As presently designed and operated, the feedstock system results in an inequitable tax burden on an extremely narrow segment of the industry. Specifically, only a dozen companies are now paying almost 70 percent of the Superfund tax. A more equitable apportionment of the tax burden is needed in which everyone who is or has been part of the hazardous waste disposal problem is part of the Superfund solution.

We believe that one way to achieve a more equitable allocation of the Superfund tax is by supplementing the current funding approach with a "waste-end" approach which taxes the types of hazardous waste which the Superfund program is designed

to clean up. The need for significant feedstock tax increases could be eliminated by the establishment of a waste-end tax at reasonable levels.

Such a "waste-end" tax should be designed to achieve certain important objectives:

- o To distribute fairly the tax burden of site cleanup on all hazardous waste disposers;
- o To provide a direct economic incentive to minimize waste disposal practices that have resulted in Superfund sites; and
- o To encourage the use of alternative methods of disposal, such as treatment and incineration, rather than land disposal.

A reasonable "waste-end" tax on each dry weight ton of hazardous waste received for land disposal or long-term storage would achieve these objectives. We therefore strongly support enactment of such a tax.

TAXATION OF SODIUM HYDROXIDE AND POTASSIUM HYDROXIDE

Under current law, caustic soda (sodium hydroxide) and caustic potash (potassium hydroxide) are subject to the feedstock tax. We strongly believe that these materials are not the types of chemicals that were intended by the Congress to be in the class of taxable feedstocks.

Caustic soda and caustic potash do not contribute to the hazardous waste problem. Among their many uses is the neutralization of acids commonly found at hazardous waste sites. The caustics are also important in air and water pollution control systems, food processing, paper manufacture, cotton cloth production, and household products. Neither compound is on any list of suspected carcinogens, mutagens, or teratogens, and, in fact, the Food and Drug Administration has approved both compounds as safe food additives.

By taxing sodium hydroxide and potassium hydroxide as feedstock materials, the very intent of Superfund is defeated. Superfund was meant to protect the environment from hazardous wastes. Continuing to impose a tax on caustic soda and caustic potash -- environmentally beneficial chemicals -- ignores their contribution to the Nation. When applied to caustic soda and caustic potash, the feedstock tax can only be termed counterproductive. For these reasons, the Chlorine Institute strongly recommends that these two caustics be removed from the list of Superfund "feedstock" chemicals.

VICTIM'S COMPENSATION

In the 98th Congress, several "victim's compensation" proposals were made. The proposed programs would have provided payments to persons whose health may have been affected by exposure to hazardous substances. A victim's compensation

program under Superfund would add a serious and enormously costly federal program to EPA's basic clean-up mission and would divert needed funds from cleanup and control programs. Furthermore, companies that did not create hazardous waste problems in the past and therefore are not responsible for injuries caused by hazardous substances will face an additional economic burden under Superfund.

The Chlorine Institute believes that Congress should carefully deliberate a victim's compensation proposal on its own merits. Such legislation should not be linked to the critical provisions of the Superfund reauthorization legislation.

SUMMARY

The Superfund reauthorization should create a program that is more equitable, efficient, and attuned to the hazards which created the need for the original legislation. The Chlorine Institute endorses a reasonable spending level, the enactment of a waste-end or similar tax, the removal of caustic soda and caustic potash from the list of feedstock chemicals, and the separate consideration of victim's compensation legislation.

Questions on the Chlorine Institute's position on the Superfund legislation may be directed to Mr. Robert L. Mitchell Jr., President of the Institute, at (212) 819-1677.



Institute of Chemical Waste Management

1730 Rhode Island Avenue, N.W., Tenth Floor, Washington, D.C. 20036 • 202/659-4613

STATEMENT OF

Suellen W. Pirages, Ph.D.
Director
Institute of Chemical Waste Management

ON

S.51, THE SUPERFUND IMPROVEMENT ACT OF 1985

SUBMITTED FOR THE RECORD

TO

SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

FEBRUARY 25, 1985

As Director of the Institute of Chemical Waste Management (ICWM), I am pleased to submit this statement for the record on Senate Bill 51, the Superfund Improvement Act of 1985. The Institute is a component of the National Solid Wastes Management Association. The ICWM members are those waste service companies actively engaged in all aspects of hazardous waste management: treatment, storage and disposal. In addition, ICWM members conduct remedial actions under the Superfund program and receive Superfund wastes for treatment and disposal at our commercial facilities.

The Institute strongly supports reauthorization of the Comprehensive Environmental Response and Compensation Liability Act (CERCLA). If this necessary legislation is not reauthorized in an expeditious manner, the progress begun by the U.S. Environmental Protection (EPA) in cleaning up yesterday's waste problems will be adversely impacted. The program is gaining momentum. If the initial successes are to continue, Congressional support of this program is essential.

In particular, the Institute supports Section 1064(B) of S. 51, Superfund Improvement Act of 1985, requiring remedial actions that involve treatment of the contaminated material, to the extent possible. We also support Section 108 of this bill, requiring states to assure the availability of treatment and disposal facilities as a condition for receiving federal remedial action of state sites.

During the Committee deliberations, I would hope that attention is given to two issues relevant to this legislation: the scope of the Superfund program and the extremely serious problem of the unavailability of environmental impairment liability (EIL) insurance. The insurance issue has become a legitimate crisis for the regulated community, because facility owners/operators are required under the Resource Conservation and Recovery Act (RCRA) to demonstrate financial liability coverage for pollution related issues and damage.

The original CERCLA legislation as passed by Congress in 1980 was aimed at resolving environmental problems that were a direct result of past management practices for chemical and industrial wastes. The Act states:

"To provide for...cleanup of inactive hazardous waste disposal sites." (42 U.S.C. 9601).

As a matter of law, the reach of CERCLA is broader than merely providing for the cleanup of abandoned chemical waste sites. Specifically, CERCLA authorizes the cleanup of "releases" of "hazardous substances" and "pollutants and contaminants" from any "facility". Indeed, the NPL presently includes some facilities that do not fit the description of the general type of chemical waste site.

But against the literal language of the Act is the voluminous legislative history indicating a clear Congressional intent that the

main purpose of the Hazardous Waste Response Trust Fund was to address response costs at "orphaned" sites. Notwithstanding this intent and goal, EPA has begun recently to raise the issue of what should be the full scope of the fund, and in so doing is signalling Congress for direction on the use of the fund in the future.

For example, on February 14, 1985, EPA made a final addition to the NPL of several sites that had been contaminated with radioactive material (Federal Register, Volume 50, Number 31, page 6320). On October 15, 1984, the Agency proposed to list on the NPL six drinking water aquifers in Hawaii because of pesticide contamination from agricultural uses. EPA noted in its request for comments that "listing these sites may set important precedents with currently unknown implications for the future direction of CERCLA."

Indeed, this would be the case. The Institute believes that now is not the time to enter a manic phase with regard to the uses of the fund. There is enough work at hand to occupy EPA and the states with cleaning up traditional type hazardous waste sites. This clearly is the finding of the December, 1984, "Section 301(C) Study" wherein EPA states that its projections of 1,800 NPL sites and \$11.7 billion funding needs is ~~is~~ based on only addressing "traditional" hazardous waste sites.

Finally, this Committee is fully aware of the impending crisis situation in the lack of available environmental impairment liability

(EIL) insurance. It is important to understand that the evaporation of the EIL market is not due to perceptions of increased risks at hazardous waste sites. Rather, the disappearance of this market is due to a legislative, judicial and regulatory climate on environmental issues in the United States, which is so volatile that reinsurance underwriters have no ability to put limits on risk exposures. As you know too well, various provisions in CERCLA have been identified as contributing to the insurance problem.

In this regard, Sections 114 and 115 of the bill are designed to remove some of the impediments adversely affecting the availability of insurance, and the Institute supports these proposed changes. We leave to the insurance industry, however, more elaborate comment on this aspect of the bill.

No one would argue that victims of hazardous waste contamination incidences should not receive legitimate compensation, great care must be exercised in drafting this scheme to assure for a fair balancing of the very complex legal, policy, and social issues involved. What no one wants to see is the creation of another entitlements program in the disguise of a victims' compensation scheme, which could have long-lasting and dramatic consequences on the legal system and the environmental pollution insurance market.

Finally, the ICWM strongly supports continuation of the Post-Closure Liability Trust Fund. It is the only mechanism available to provide

financial responsibility assurance for a site after closure. We understand that this issue is the jurisdiction of the Senate Committee on Finance. Our statement on financing this trust fund and the Hazardous Waste Response Fund is being directed to that Committee.

In conclusion, the Institute supports the Senate Committee on Environment and Public Works in its attempt to take expeditious action in passage of the Superfund Improvements Act of 1985. The ICWM would urge consideration of a limitation of the National Priority List to inactive hazardous waste disposal sites. Careful consideration of the impact legislative language can have on the current insurance crisis is urged.

Suellen W. Pirages, Ph.D.

Director, Intitute of Chemical Waste Management

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J. Burgess Winter
 Sr. Vice President
 Operations

March 1, 1985

Kennecott

Honorable Robert T. Stafford
 Chairman
 Senate Environment and Public Works Committee
 Senate Hart Building
 Room 133
 Washington, D. C. 20510

Dear Chairman Stafford:

Kennecott appreciates the opportunity to provide the enclosed statement for the record as part of the Senate Environment and Public Works Committee's February 25, 1985 hearings on reauthorization of the Superfund Law.

Our statement delineates in a concise fashion the severe economic crisis currently confronting the domestic copper industry. Indeed, the survival of this strategically vital domestic industry is at stake. Any additional economic burdens resulting from imposition of a Superfund feedstock tax on copper metal or an ill-conceived waste-end tax program on the mining industry would be counterproductive and would contribute to the further decline of the industry.

As you know, when the Superfund law was enacted in 1980, Congress considered whether copper metal should be taxed. After careful review of the available evidence, Congress rejected such a tax as inappropriate and instead placed a feedstock tax on three potentially hazardous copper compounds. We are greatly concerned about the adverse marketing impacts if copper metal — widely utilized throughout our society to carry our drinking water, and used in cooking utensils, jewelry, roofing and other essential applications — were to be labelled as a hazardous substance under Superfund.

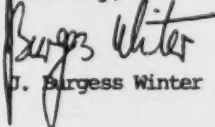
Our testimony emphasizes three major points:

1. Copper metal, a benign metal, is inappropriate for inclusion in Superfund;
2. Superfund taxes would have a severe economic impact on the already severely depressed copper industry; and
3. Waste-end taxes designed for low volume high toxicity wastes are particularly inappropriate for the mining industry's high volume and low toxicity wastes.

Honorable Robert T. Stafford
March 1, 1985
Page Two

We understand that the taxation of copper metal is not an issue of contention in the Senate. However, because of the extreme economic burden such a tax would place on the industry at a time when it is fighting for its very survival, we wanted to alert you and other members of Congress to the importance of careful assessment of the economic impacts of actions under Superfund.

Sincerely,


J. Burgess Winter

/mf
Enclosure

cc: Members of Senate Environment and Public Works Committee
Members of Senate Finance Committee

**STATEMENT FOR THE RECORD
OF KENNECOTT
BEFORE THE SENATE ENVIRONMENT
AND PUBLIC WORKS COMMITTEE
ON
SUPERFUND REAUTHORIZATION**

February 25, 1985

Introduction

Mr. Chairman and Members of the Committee, Kennecott appreciates the opportunity to provide our thoughts to this Committee on reauthorization of the 1980 Superfund law. This testimony summarizes and extracts highlights from a much more detailed analysis of Superfund and its potential impact on the copper industry.

Background: Copper Industry Status

Kennecott has testified before many committees of Congress in the past, and on a variety of topics. Usually Kennecott has testified from a position of strength as the largest copper producer in the U.S., frequently the world, and has had a proud story to tell of high employment and good profitability at its many mines, mills, smelters, and refineries in six states. Our annual payroll exceeded \$300 million and local, state and federal taxes of over \$100 million per annum, have all been contributed from a workforce of over 12,000 personnel.

It is with no great pride that we provide these comments to you today as a major domestic copper company that is part of an industry facing a severe economic crisis evidenced by the following grim statistics:

- Approximately 40-50% of domestic copper mines are closed, and it is doubtful that many will ever reopen.
- The workforce in the copper mining, smelting and refining sector has dropped 48% to a present level of 23,000, down from 44,000 in 1979.
- The U.S. share of free world copper mine output dropped to 16% in 1984 from 23.5% in 1979.

- Domestic primary copper producers have lost an estimated \$2.6 billion dollars between 1981 and the present. Losses at Kennecott approached \$500 million over this same period.
- Beginning in 1982, the U.S. economy has emerged from a painful recession with the strongest economic recovery of the postwar years. Domestic copper demand has likewise recovered, with consumption in 1984 at near record levels, but a strong U.S. dollar and overproduction from partially subsidized and government-owned producers in the Third World has kept copper prices close to depression era levels in real terms.
- The domestic copper industry has not been idle. A vigorous program of reorganization and modernization is being implemented. By the closure of unprofitable mines and major productivity improvements the domestic industry has lowered production costs by 18% between 1981 and 1984, according to estimates made by the U.S. Bureau of Mines. Kennecott's cost reductions have been even more dramatic. Impressive as these gains are, they have not been sufficient to offset the precipitous decline in copper prices during this same period.

Two relevant points in the context of Superfund:

- The very survival of this strategically vital domestic industry is at stake. The United States may well move from a position of over 90% self-sufficiency in copper to one of progressively greater import dependence -- a situation not brought about by geological accident (the United States has the world's second largest reserves of copper), but rather from a failure of the "free market" to exist because of subsidized foreign government-owned production.
- Any additional economic burden resulting from imposition of Superfund feedstock, or worse, waste-end taxes, would be counterproductive. At best, funds badly needed for further modernization to improve the industry's competitiveness would be diverted. At worst, the decline of a vital industry will be hastened.

The Present Situation

In 1980 when CERCLA was enacted, Congress considered whether copper metal should be taxed under Superfund. After a careful review of the available evidence, Congress rejected such a tax as inappropriate for non-toxic copper metal, and instead placed a feedstock tax on three potentially hazardous copper compounds (i.e., cupric oxide, cupric sulfate, and cuprous oxide). These chemicals are not a byproduct of primary copper production, but are manufactured by another distinct industry.

Potentially Ominous Developments

As the time for reauthorization of Superfund draws near, there are three developments which could radically alter this status quo:

- One House legislative proposal (HR 5460 which passed the House in August 1984 and which may be reintroduced in this Session) added copper metal to the list of taxable feedstocks on revenue raising grounds only -- despite Congress's earlier findings about copper's non-toxic nature and inappropriateness for taxation -- at tax rates that would cost the industry more than \$375 million over a five year period. This tax proposal, if implemented, would adversely affect, in a major way, the ability of the domestic copper industry to be competitive with foreign products.
- Some Senate legislative proposals (e.g., S.51 (Stafford) or S.14 (Moynihan)) have been offered that would impose waste-end taxes which, depending upon the bill and its subsequent interpretation, could cost the domestic copper industry from \$37.5 million to \$102.2 million over a five year period.
- EPA has completed a series of so-called "Section 301" studies that erroneously indicate that copper metal is eligible for Superfund taxation, propose a feedstock tax on copper metal based on the mere presence of copper at Superfund sites (without regard to its mobility/toxicity/hazard), evaluate waste-end taxes which could cost the industry from \$172.5 million to \$545 million over a five year period, and finally conclude falsely that the impacts of these taxes on the industry would be "slight."

Because of these developments, there are three major points we would like to emphasize. First, non-toxic copper metal does not qualify for inclusion in Superfund. Second, Superfund taxes could have a severe economic impact on the severely depressed copper industry. Third, waste-end taxes are particularly inappropriate for the mining industry. These are presented below.

A. Non-Toxic Copper Metal Should Not Be Taxed in Superfund

Copper metal is utilized throughout our homes to carry water, for cookware, electrical wiring, jewelry, coinage and is essential for human metabolism. In addition, our Nation depends on copper metal in its industrial operations, and for critical strategic applications.

Copper metal does not meet the tax criteria established by Congress in 1980 and used by EPA to determine eligibility for Superfund taxation.

In the "Section 301" studies, EPA was required to consider the continuation of copper's exemption from CERCLA taxation based upon the expenditure experience of Superfund. Lacking the data on mobility/toxicity/hazard of various compounds at Superfund sites necessary for a rational appraisal, EPA elected instead to use data on frequency of occurrence of copper or other compounds at NPL sites as a surrogate for the expenditure experience of the fund. In other words, if copper or its compounds could be detected (or could be assumed to be present) at an NPL site, its presence was assumed to have caused (at least in part) the problem and, therefore, the necessity for remedial action.

To illustrate the absurdity of EPA's position, if copper and dioxin were the only substances present at a site above detectable limits, copper would be assigned a 50% contribution to site cleanup costs. Clearly this assumption is both naive and unwarranted. Moreover, the detectable limit of copper in soil is approximately 0.1 parts per million (ppm). The copper content in the earth's crust averages between 4 to 90 ppm, dependent upon the type of soil or rock so it is likely that most, if not all, NPL sites will contain some copper above the detectable limit -- but so too would Yellowstone Park, the Grand Canyon, etc.

We urge this Committee to reject the flawed EPA analysis and keep copper metal out of any feedstock taxing provision.

B. Superfund Taxes Would Have Severe Economic Impact On The Copper Industry

The domestic copper industry faces intense competition from foreign producers; major exporters to the United States include Chile, Peru, Zaire, and Zambia -- countries which have only modest if any environmental requirements. In contrast, U.S. producers face environmental regulations that are among the world's most stringent -- regulations that entail compliance costs of between 10 and 15 cents per pound of copper produced. Competitive advantage in this industry is measured in pennies per pound, and domestic producers cannot generally pass on cost increases to consumers because world copper prices are established by the world supply/demand balance and not set unilaterally by U.S. producers.

Kennecott's analysis of the various Superfund legislative options indicates that, depending upon the option and some details of interpretation, these could cost the industry between about \$33 million and \$545 million over a five year period, an equivalent range of from 0.3 cents per pound to 4.7 cents per pound of copper produced. The more expensive of these options can only be described as ruinous given the present conditions of the industry.

We urge Congress to weigh carefully the economic impacts of their actions on this industry. In this regard, the EPA "Section 301" studies are unfortunately not a useful or reliable source of economic impact information. These analyses contain major flaws in both assumptions and methodology. Briefly, these studies underestimate the tax burden of various proposals, and the competitive effects of these costs on the industry. Moreover, the EPA analysis fails to consider the adverse economic impacts on the copper fabricating industry -- an industry that would be placed at a competitive disadvantage because offshore fabricators would have access to foreign materials not subject to this tax. As a consequence, foreign copper fabricated products would be cheaper than comparable domestically fabricated products.

C. A Waste-End Tax Is Inappropriate, Especially For The Mining Industry

Kennecott is concerned that consideration is being given to a "waste-end tax" on mining. The concept of a "waste-end tax" was derived from industries which generate small volumes of highly toxic waste. The mining industry generates huge quantities of low toxicity waste. For example, in the

production of copper, 600 tons of material are moved for each ton of refined copper produced. Historically, Kennecott alone has moved over 600,000 tons of material a day. Since this material is retained in a natural state, and is merely moved from one location to another during the mining process, we are opposed to its inclusion in any waste-end tax.

Congress, under the Solid Waste Disposal Act (Section 8002), has requested EPA to evaluate whether mining wastes should be regulated. Therefore, imposition of any waste-end tax on the mining industry should be deferred until completion and peer review of these studies (expected in 1985).

Kennecott considers that even the concept of waste-end tax under Superfund is wrong, since it:

- Is not needed:
 - EPA's projected funding requirements do not justify a waste-end tax.
 - RCRA already provides incentives to reduce waste generation and requires environmentally sound disposal.
- Would hurt U.S. trade:
 - Domestic manufacturers would be harmed by foreign competition, since a comparable waste-end tax on foreign imported products is not contained in any of the legislative proposals. If such a tax is contemplated it is essential that it apply to copper and copper product imports as well.
- Is an inappropriate use of taxing authority:
 - Unless Congressional review is specifically provided for in the legislation, EPA can, by merely reinterpreting definitions of hazardous wastes, effectively levy taxes on industry.
 - The tax would be inequitable unless based upon degree of health and environmental waste hazard.
 - Does not take into account the environmental merits of the waste disposal method selected.

- Adversely impacts the RCRA program:
 - Increases the incentive to seek delisting, thereby slowing EPA enforcement.
 - May result in under-reporting or illicit disposal.
- Would be costly to administer:
 - States have experienced high administrative costs compared to revenue raised.
 - Increases compliance costs on industrial operations for which the consumer pays.
 - Proper enforcement by Federal/State or local agencies would be difficult.
- Is unreliable:
 - Tax base would erode due to alternate waste management methods or other forms of tax avoidance.
 - States have experienced significant shortfalls in projected waste-end tax revenue.
 - Changes to RCRA regulations would alter the tax base.

Conclusion

To tax copper metal in any way to generate revenue for the cleaning up of abandoned hazardous waste sites would be wrong, since (1) copper metal is non-toxic, (2) such a tax would be particularly burdensome on domestic industries such as copper which face strong foreign competition, and (3) the domestic copper industry is currently undergoing severe economic problems. Therefore, we do not believe it would be wise public policy to imperil further the economic viability of this basic and strategically important industry.

FEB 26 1985

THE NAVAJO NATION

WINDOW ROCK, NAVAJO NATION (ARIZONA) 86515

PETERSON ZAH

CHAIRMAN, NAVAJO TRIBAL COUNCIL



EDWARD T. BEGAY

VICE CHAIRMAN, NAVAJO TRIBAL COUNCIL

February 25, 1985

The Honorable Robert T. Stafford
 Chairman, Committee on Environment
 and Public Works
 SH-133 Hart Senate Office Building
 Washington, D.C. 20510

Dear Senator Stafford:

On behalf of the Navajo Nation, I want to take this opportunity to submit our comments regarding S. 51, the proposed "Superfund Improvement Act of 1985." This legislation embodies many carefully crafted provisions which grew out of the extensive deliberations your Committee held during the last Congress. With respect to Section 101, which makes the Federal toxic waste regulatory scheme responsive to Indian tribes, you and the members of your Committee are to be commended for undertaking an extremely thoughtful review of the needs of Indian Tribes. The approach which you have adopted allows us meaningful participation in the Superfund program while recognizing our status as self-governing bodies involved in a government-to-government relationship with our Federal trustee.

As you may know, the Navajo Nation has over 160,000 members on our Reservation, stretching through the states of Arizona, New Mexico and Utah. The Reservation covers 16 million acres, the approximate size of New England. For many years, our lands have served the needs of a growing America hungry for energy and other natural resources. Extensive fossil-fuel and uranium development have occurred on Navajo land. The after-effects of such development -- disposed-of tailings, contamination of groundwaters, surface waters, the land base and the air -- are abundantly evident.

A similar fate has befallen many other Indian reservations across the United States. Presently, more than 92 million acres of land and natural resources are held in trust for 258 Federally-recognized tribal and native governments. Toxic-waste disposal sites are located on a significant number of these reservations.

The Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), while a landmark both in scope and effect, unintentionally left the American Indian tribes outside its framework. We have been left in a regulatory "vacuum." A serious need exists to involve tribes directly in the Act's site - identification and selection processes, and to ensure that its future-maintenance assurances and cost-sharing provisions are not an ultimate bar to the prospect of clean-up of toxic waste sites on Indian lands.

Two members of your Committee, Senators Abdnor and Hart, invested a great deal of time and effort in working with Tribes to develop responsive, practical legislative language. Their efforts were contained in S. 2892 reported by your Committee last year, and this language, with only minor modification, is now Section 101 of S. 51.

As written, S. 51 would:

- o Incorporate the generally accepted definition of "Indian Tribe" into the Act. It departs from the definition contained in the 1975 Indian Self-Determination and Education Assistance Act, 25 U.S.C. Section 450(b), only insofar as it would exclude Alaska regional or village corporations -- which are for-profit rather than non-profit governmental entities -- from the definition.

- o The language also clarifies the definition "natural resources" in Section 101(16) to expressly include resources owned directly by or held in trust for tribes or for their individual members, by the Federal Government.

- o Exempt waste sites on Indian lands from CERCLA's cost-sharing and future-maintenance assurance requirements. By every indication American Indians rank among the most economically impoverished of all Americans. In some instances the decision to locate toxic disposal sites on Indian lands was made without informed tribal consent. Under these circumstances it would be manifestly unjust to predicate the clean-up of such sites on these cost-sharing and maintenance assurances. S. 51 recognizes this by waiving the cost-sharing requirement, and calling upon the President, as senior fiduciary of the trust responsibility, to provide the maintenance assurances.

- o Provide to Indian Tribes the same ability as states to assert a claim against the Hazardous Substance Response Fund in appropriate circumstances. The language would allow such a claim to include the cost of tribal efforts to restore, rehabilitate or replace damaged resources, and would authorize the President to delegate authority to obligate money in the Fund to officials of the Tribe which is operating under a contract or cooperative agreement with the Federal Government.

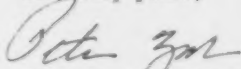
o Ensure that Tribes would not be penalized -- in the sense of being foreclosed from bringing claims for damages under the Act -- because they have relied on the customary responsibility of the Federal trustee to protect tribal natural resources on their behalf. In the event the trustee were to give a tribe written notice that it will not be bringing such an action, the tribal governing body would then be free to commence the claim itself within the three-year time limitation period. Alternatively, were the three-year period to lapse with the Trustee failing to take any action whatsoever, the tribal governing body would then have an additional three years to consider bringing its own claim.

o Afford tribal governing bodies substantially the same treatment as a state with respect to the provisions of CERCLA regarding notification of releases; consultation and establishing and maintaining national registries and roles and responsibilities under the national contingency plan and submittal of priorities for remedial action (but not regarding the inclusion of at least one facility per state on the national priority list).

Taken as a whole, these provisions of Section 101 of S.51 provide a model framework for integrating the range of Indian tribal concerns into a complex environmental statute. The Navajo Nation is pleased that S. 51 will proceed soon to mark up before your Committee, and urges its speedy enactment.

Should you have any questions about these comments, please have a member of your staff contact Pablita T. Abevta, Navajo Nation Washington Office, at 202/775-0393.

Sincerely yours,



Peterson Zah, Chairman
Navajo Tribal Council



STATEMENT OF

THE NATIONAL PAINT AND COATINGS ASSOCIATION, INC.

FOR

THE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

UNITED STATES SENATE

SUPERFUND REAUTHORIZATION

FEBRUARY 25, 1985

WASHINGTON, D. C.

Statement of Interest

The National Paint & Coatings Association (NPCA) is the national trade association for the coatings industry in the United States. Our membership is highly competitive and for the most part comprised of small and medium-sized privately held corporations. Superfund impacts dramatically on our industry in several regards. First, we pay the tax as a pass-through cost on our raw material invoices. Second, over 100 companies have received at least one notification as potentially responsible parties for cleanup of national priority sites. Third, any suggestion of a new "waste-end" tax will cost the paint industry substantially.

The paint industry advocated reauthorization of Superfund in 1984. We worked last year to convince Congress of the merits of realigning the liability provisions in order to encourage voluntary cleanup. We will strive this year to see enactment of a liability scheme which can improve cleanup performance and preserve equity in the law.

Testimony

The National Paint and Coatings Association believes that the liability provision for cleanup in Section 107 of the current Comprehensive Environmental Response, Compensation, and Liability Act is critical to the success of the program. Indeed, no legitimate assessment of what is required for the next five years in the fund can be undertaken without a thorough review of the current enforcement morass which thwarts voluntary contribution towards cleanup and has induced a nightmare of fruitless lengthy negotiations followed by complex litigation: all of which has served only to delay cleanup and waste the resources of the fund and the assets of the potentially responsible parties. NPCA urges this committee to hold at least one full-scale hearing to scrutinize EPA's enforcement policy. We are certain that this committee would realize that preserving the status quo or instituting "joint and several" liability by amendment is the opposite way to provide an impetus for voluntary expedited contribution to the fund by responsible parties.

It is wrong to assume, as some do, that the current system works because courts are allowed to apportion damages once liability has been adjudicated. As a matter of fact, most of the cases where negotiations have broken down are still in the motions at law stage. As a matter of public policy, it is counterproductive to clog the already burdened federal court system with complex, highly technical determinations of fact. The breakdown of proportionate liability is best handled by the U.S. EPA itself, which is charged to perform the remedial investigation and feasibility studies and has the knowledge and technical acumen to administer a claims procedure to expedite recoupment to the fund.

The current law is ambiguous with regard to the scope and standard of liability. The government contends that Section 107 should

be enforced as though joint and several liability were the standard in order to hold any or all parties liable for the full costs of cleanup. Several court decisions have concluded however that reading Section 107 as explicitly imposing joint and several liability in every instance would fly in the face of the intent of Congress when it passed Superfund. A comprehensive analysis by the U.S. Administrative Conference in 1984 of the Superfund program concluded that the government's insistence on joint and several liability has seriously impeded voluntary expedited cleanup because companies are afraid of coming forward only to face total responsibility for cleanup. The report recommended instead an administrative apportioning of liability based on the volume and nature of wastes dumped by a site user. (Negotiation and Informal Agency Action: The Case of Superfund. The Administrative Conference of the U.S., Frederick R. Anderson, Professor of Law, University of Utah, May 25, 1984.)

The U.S. EPA believes that the liability of potentially responsible parties should be joint and several unless they can clearly demonstrate that the harm at the site is divisible. EPA reasons that the recognition on the part of responsible parties that they may be jointly and severally liable is a valuable impetus for these parties to reach the agreements that are necessary for successful negotiations. "Without such an impetus, negotiations run a risk of delay because of disagreements over the particulars of each responsible party's contribution to the problems at the site." (EPA's Hazardous Waste Enforcement Policy. 24 Fed. Reg. 5035.)

According to the U.S. Administrative Conference, however, the more rigid and inflexible the government's legal position is fashioned, the less incentive there is for a company to deal with the government at all. Lawyers for potentially responsible parties have already compiled an impressive inventory of major litigable legal issues. In such an adversarial climate, responsible parties are less likely to understand and sympathize with the government's objectives. Soured relations can quickly develop as a result of data sheltering and the reduction or elimination of contacts between EPA officials and site users due to client-attorney relationships.

Insistence on joint and several liability will only lead to more litigation and less voluntary payments or remedial actions. Waiting until a judicial determination of liability before costs and damages are apportioned is time consuming and wasteful. Court-ordered technical solutions are not likely to be optional in these circumstances. The judge is less likely to develop an adequate appreciation of technical complexities and uncertainties, particularly if only a few of the responsible parties are sued, due in part to inadequate information. Site users will of necessity shift some of the resources which might otherwise have been available for prompt site cleanup into paying the high transaction

costs of litigation in an attempt to reduce or at least define their CERCLA liability.

This situation exists in numerous current Superfund enforcement cases. In a typical one involving two waste recycling sites in Gary, Indiana, known as Midco, the government rejected a proposal by a group of generators constituting approximately 60 percent of the volume of waste allegedly sent to the sites even though the group's proposal approached 90 percent of the estimated costs and remedial actions required.

Since May 1982, EPA has insisted that any company that used the Midco sites is responsible for the entire cleanup and that any voluntary response by any generator company or group of companies must include essentially 100 percent of the cost of cleanup of both sites. On January 19, 1984, the government filed its First Amended Complaint, naming as defendants only nine of the 121 companies that it had previously identified as having generated waste shipped to the Midco sites. The government alleges that these nine companies are strictly and jointly and severally liable for reimbursing all government costs and, through injunctive relief, to carry out all necessary remedial actions for any surface and subsurface contamination. Among the nine generator defendants are those companies that had led the effort since May 1982 to undertake a voluntary site cleanup and cost reimbursement.

Obviously, imposing rigid joint and several liability in this case has not served as an impetus for achieving a voluntary expedited response to cleanup.

If Congress wants to ensure predictable and substantial recoupment to the fund so that the size of the fund can be kept at a level that is fair to those who pay, then it must provide a legitimate incentive for voluntary contribution to cleanup. If any potentially responsible party can demonstrate clearly a reasonable basis for determining his contribution to the projected costs or damages, he should be entitled to pay that amount or take those steps necessary for cleanup.

The Agency should be charged to establish a claims procedure which would require the government to apportion responsibility for those parties whose contribution to the hazardous situation is adequately documented and understood either by its own investigation or by evidence presented by the party itself. Any parties shown to be liable but insolvent should have their shares equitably allocated and drawn from the fund. Any remaining costs would be covered by the fund. In either case those who contributed to the site pay for the cost of cleanup either through their apportioned share or through their tax payments to the fund.

To protect against those who prefer to "hide in the weeds" rather

than come forward to contribute their fair share, strict, joint and several liability shall be the remedy against such parties. Furthermore, all parties that may be liable under Superfund should be allowed to bring an action for contribution or indemnity to a U.S. District Court. The courts should specifically retain their traditional equitable powers of apportionment to guarantee fairness should the government's enforcement be carried to litigation and resolution on the merits.

The role of both the Agency and the courts should not be that of punitive masters. Their proper role is to compel such reimbursement and issue such equitable relief as best ensures that Superfund achieve its primary goal: the best short-run and long-term cleanup and remedial action of the largest number of sites in the shortest possible time at the lowest cost.

There are many ways to fashion an effective administrative claims procedure. One is to provide a notified potentially responsible party a limited period of time (e.g., one year) in which to gather and present all relevant records and other information regarding his contribution to the problem. This information could be received and processed by the enforcement arm of EPA or even by a special master approved by the EPA. The agency (or the special master) could determine the contribution percentage of each responsible party based on volume, relative toxicity, nexus to the site, and whether the legal requirements of the day had been met. The fund would pay for the portion of response costs not assigned to responsible parties.

If a notified responsible party did not or could not produce adequate documentation of his relative contribution within the stated time period, he would face joint and several liability with all other such persons for all remaining response costs.

Should EPA have to litigate its demand for contribution, the following language should be added to Section 107 in order to clarify the confusing and unfair current law:

"Section 107(a) of CERCLA is amended by adding the following new subsections at the end thereof:

(5) If any defendant in an action under this section establishes by a preponderance of the evidence that the costs or damages referred to in subsection (4) are divisible so that there is a reasonable basis for determining his contribution to the said costs or damages, he shall be liable only for that portion.

(6) Nothing in this section shall be construed to limit the equitable powers of apportionment of any court in connection with an adjudication of liability under this section.

(7) In making any determination as to apportionment or contribution under this section, the court shall allocate equitable shares to any parties shown to be liable but insolvent and shall direct that such shares be drawn from the Fund pursuant to Section 111(a).

(8) All parties that may be liable under this section may in the discretion of the court be joined by existing defendants as co-defendants.

(9) Any defendant held liable in an action under this section may bring an action for contribution or indemnity in the same United States District Court.

(10) Contribution and indemnity shall be determined by the court on the basis of such equitable considerations as are appropriate to the case."

The cited liability amendment was proposed by Congressman Robert Roe (D-NJ), and approved overwhelmingly by the Public Works and Transportation Committee as an amendment to H.R. 5640 in 1984. Chairman Roe and others were concerned that the rigid imposition of joint and several liability could deter voluntary compliance. He recognized that while liability under Section 107 is to be applied as it is interpreted under Section 311 of the Clean Water Act (where joint and several liability is the rule), the 311 cases are more straightforward, involving a limited number of parties directly responsible for causing an indivisible harm.

The parties involved in a Section 311 action are in a position to apportion the damages among themselves, unlike a typical Superfund case with hundreds of parties trying to reconstruct what their past activity contributed to a present harm. They may have sufficient knowledge of their own contribution to the hazardous waste site, which they should be encouraged to provide, but it is unlikely that they have any knowledge whatsoever of the participation and contribution of other potentially responsible parties.

The Roe approach reflects an understanding of the practicalities of a typical Superfund case. It is intended to encourage fair voluntary payments towards cleanup. Combined with the thorough analysis performed by Professor Anderson of the U.S. Administrative Conference on the proper role of negotiation and facilitating claims in the Superfund law, a framework has been developed for effecting amendments for the better to the liability provisions in the law. NPCA urges serious consideration of these recommended changes to both the administrative scheme and the legal remedy section of Superfund. Liability can be both the key and the lock for this program. At the moment, it locks out wholesale voluntary fair-share contribution to cleanup. With some slight revamping, along the lines suggested herein, it can provide a real impetus for voluntary compliance.

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 The New England Council, Inc.
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70 potential hazardous waste sites have been identified for investigation and evaluation by the EPA. Roughly \$67 million of Superfund money has been spent to clean New England sites.

New England National Priority List Sites as of December 1984 were as follows:

Massachusetts	21	Connecticut	6
New Hampshire	11	Maine	6
Rhode Island	7	Vermont	2

It is common in New England for Superfund sites to have multiple "potentially responsible parties." According to an Arthur D. Little report to The Council, approximately 90 percent of New England establishments producing hazardous by-products are small generators. Unlike other regions, New England does not have a few large centralized petrochemical plants generating large amounts of hazardous waste. Instead, many small facilities representing a wider cross section of both manufacturing and services and including many of the high technology industries are dispersed throughout the region.

In addition to national and state regulations, the region's high precipitation rate, hydrologic structure, economic development and environmental history have shaped its treatment, disposal and storage of hazardous materials.

In total, one million employees (or 67 percent of New England's manufacturing employment) with a payroll of

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\$15 billion are employed in 13,440 New England industries whose by-products are hazardous.

At the present time, existing New England waste management services are inadequate to take care of a large percentage of the hazardous waste currently generated in the region irrespective of waste resulting from the cleanup of regional National Priority Sites. This lack of modern waste management affects high technology companies, traditional manufacturers, universities and hospitals, as well as communities with identified abandoned sites.

Long distance transport, sometimes as far as Alabama and Ohio, puts regional generators at a significant disadvantage because of the additional \$15-25 million direct long-distance disposal costs and significant indirect liability costs associated with transportation and corporate monitoring. Transportation distances in other regions are considerably lower.

The larger number of small generators in New England, i.e., those establishments generating less than 100 kilograms per month under state regulations, results in a higher regional average unit cost for treatment and disposal than the national average.

The New England Council believes strongly in "home rule" and in the value of regional collaboration to achieve modern,

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high technology waste management practices and facilities. Actual siting of new facilities has proven to be an intractable problem. The solution requires the energy and contribution of all sectors and all levels of our society. Along with government regulation, effective planning and modern technology are prerequisites to successful siting. But, the mere presence of these elements, in our view, will not lead to the creation of new sites. They must be linked with a concurrent, and politically difficult, decision-making process.

The Council has built and will continue to work with a broad-based regional coalition to ensure that environmentally sound and cost-effective practices and services are brought to and built in New England. As a result of The Council's collaborative efforts and its surveys of different groups, we believe the business community needs to work all fronts collaboratively with environmental and public interest groups as well as government agencies if the region's hazardous waste is to be efficiently and properly managed and future Superfund sites are to be avoided.

The Council's intensive work with various state and community groups has highlighted the absence of a potentially important participant in the siting process--the federal government.

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The federal government has a contribution to make by facilitating effective state and regional planning, modern disposal practices and successful siting. Therefore, The Council supports the spirit and intent of Senator Chafee's amendment to Superfund which requires states to plan either individually or collectively adequate capacity and access to Resource Conservation and Recovery Act (RCRA) approved facilities for the treatment or disposal of all hazardous waste generated within a state for the next 20 years. The amendment requires each state to develop policies and siting programs that will make the best use of existing facilities in the short term and will assure continued facility capacity in the long term. This amendment emphasizes the primacy of the state role and state flexibility to promote source reduction as well as to develop interstate compacts and/or state or local ownership operation of facilities where needed. It allows for development of innovative and high technology solutions. And, in this way, states will avoid the creation of future Superfund sites.

The roles of government, industry, and the public are complementary in the protection of the environment, public health and safety. We ask you to help us in our regional efforts by continuing your support in Senator Chafee's amendment to Superfund.



P. O. BOX 228 • ASHLAND, VIRGINIA 23005 • TELEPHONE (804) 798-7181

February 20, 1985

Committee on Environment
and Public Works
United States Senate
Washington, D. C. 20510

Re: Superfund Reauthorization Bill (S. 51)

Gentlemen:

You may recall that I appeared before your Committee last year during the Superfund reauthorization hearings on May 23, 1984. I spoke on behalf of both Solite Corporation and Oldover Corporation in support of an energy recovery exemption in the event the committee decided to adopt a waste-tax. I would appreciate your including the enclosed comments in your review of funding sources for the pending Superfund reauthorization bill (S. 51).

Solite and its subsidiaries are engaged in the manufacture of lightweight aggregate, a product used by the construction industry in concrete and in lightweight masonry blocks. Lightweight aggregate is produced in rotary kilns through the application of intense heat to expand crushed clay, slate or shale. Lightweight aggregate weighs approximately half as much as crushed stone. Solite and its subsidiaries have safely burned over 100 million gallons of ignitable hazardous wastes as fuels since 1976. The foregoing amounts to a savings of 75 million gallons of oil or 400 thousand tons of coal. Our trucks have transported the ignitable hazardous wastes more than 10 million miles without an environmental incident.

An energy recovery exemption would not only help promote and encourage the safe and efficient destruction of hazardous wastes for energy recovery, but also help to ensure that cost-effective waste fuels would continue to be available to fuel-

intensive manufacturing facilities such as those in the lightweight aggregate, cement, iron, steel, lime and phosphate industries.

Tests conducted under the supervision of the U.S. Environmental Protection Agency (USEPA) at one of Solite's lightweight aggregate facilities have demonstrated that Solite's kilns consistently achieve a hazardous waste destruction and removal efficiency required by the USEPA. Attached is a brief summary of the Solite test findings prepared by Monsanto Research Corporation, which performed the tests under contract to the USEPA.

The Solite testing program was one in a series of 30 test programs conducted by the USEPA on a wide variety of industrial furnaces and industrial boilers throughout the United States. The testing demonstrated that industrial and some industrial boilers generally achieved destruction and removal efficiencies of 99.99% or greater safely destroying the wastes while conserving out Nation's natural gas, oil, and coal resources. These tests supported the USEPA's statements that there is sufficient existing industrial furnace and boiler capacity to safely destroy all of the burnable hazardous wastes generated in the United States today and for the foreseeable future.

Companies such as Solite can afford to continue to use Hazardous wastes as fuels only as long as the cost of conventional fuels such as oil and coal. The imposition of a waste-end tax on hazardous wastes burned for energy recovery would have a significant adverse impact on the cost-effectiveness of burning hazardous wastes in place of fossil fuels. The fee would add to the cost of burning industrial solvents and waste oils, and, along with the other costs of burning these waste fuels, narrow further the gap between the cost of burning waste fuels and the cost of burning conventional fuels.

The ultimate impact of a waste-end fee on hazardous wastes used as fuels would be to discourage their use for energy recovery. The result would be extremely unfortunate, not only for the industries that rely on these waste fuels to hold down production costs, but also for the environment and natural resources of our Nation. Millions of gallons of burnable hazardous wastes that otherwise would have been safely destroyed would be disposed of either improperly or by methods less protective of the environment than high-temperature thermal destruction. Further, millions of gallons of imported oil would be burned needlessly.

A waste-and tax on energy recovery facilities would force many energy recovery facilities to abandon the use of hazardous wastes as fuel, leaving waste generators with expensive incinerators and landfills as their only disposal options. We are confident that the increased costs of these other options will result in many generators disposing of their wastes using less expensive, more environmentally harmful alternatives including the encouragement of "midnight dumping" and other improper disposal activities.

Waste-and taxes should be designed to recognize the connection between the sources of abandoned hazardous waste disposal sites and the need to expend public funds to clean up these sites. There is no such connection for energy recovery facilities. On the contrary, it is apparent that without energy recovery facilities there would be far more abandoned hazardous waste sites than actually exist today.

Thank you for considering our views.

Very Truly Yours,

Louis R. Lawson, Jr.
Louis R. Lawson, JR.

LRL/pb

INCINERATION OF HAZARDOUS WASTE IN AGGREGATE KILNS*
JAMES A. PETERS AND DUANE R. DAY

MONSANTO RESEARCH CORPORATION
DAYTON, OHIO

ROBERT E. MOURNIGHAN
U.S. ENVIRONMENTAL PROTECTION AGENCY
CINCINNATI, OHIO

A high temperature (2000 degrees F) light-weight aggregate kiln was tested in Florida to measure the major smoke stack emissions from burning hazardous waste as supplemental fuel for energy recovery. Emissions measured included principle organic hazardous components (POHC's: toluene, tetrachloroethylene, methyl ethyl ketone, and methyl isobutyl ketone), particulate matter, trace metals, hydrochloric acid, sulfur dioxide, and nitrogen oxides. The wastes were burned with destruction efficiencies beyond the 99.99% required by the Environmental Protection Agency. Other pollutants in the smoke stack emissions were found in very limited quantities. None were considered dangerous to the environment or to the health and safety of operating personnel and the public. The tests showed that it is environmentally safe to burn some ignitable wastes as fuel in rotary kilns. There were no emissions dangerous to operating personnel or threatening to the public health and safety.

*Presented at the Tenth Annual Research Symposium on Incineration sponsored by the Environmental Protection Agency, April 3-5, 1984

SPECIFICATIONS FOR LIQUID, BURNABLE MATERIALS

Minimum 90,000 Btu per gallon.

Maximum specific gravity: 0.95

Halogens: Maximum 2.0%

Maximum dissolved or dispersed water: 10% - No free water.

Maximum suspended solids: 15% by volume - Must pass through an 1/8" screen and be pumpable.

Maximum Parr Bomb unburnable residue: 5% by weight

Must maintain combustion in open cup.

Liquid, burnable materials having an ASTM flash point of less than 140°F will be considered. Examples of acceptable materials include mixtures of aliphatic and aromatic hydrocarbons such as alcohols, acetates, ketones, toluene, xylene, hexane and petroleum distillates.

Unacceptable materials include inorganic acids or caustics, cyanides, organic sulfides, lachramates or mercaptans. No PCB's, insecticides, pesticides, herbicides or other poisonous, toxic, explosive, corrosive, reactive or radioactive materials will be considered.

Materials will be tested in our laboratories by accepted American Society for Testing Materials (ASTM) methods before acceptance. Materials not meeting specifications may be rejected and returned to the shipper at the expense of the shipper.

3/1/81



RUBBER MANUFACTURERS ASSOCIATION
1400 K STREET, N.W. • WASHINGTON, D.C. 20005 • (202) 682-4800

Statement
of the
Rubber Manufacturers Association
on S.51

Submitted to
the
Senate Committee on Environment and Public Works
by
Donald G. Brotzman
President
Rubber Manufacturers Association

February 25, 1985

The Rubber Manufacturers Association ("RMA") respectfully submits the following comments on S.51, a bill to extend and amend the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") or "Superfund". RMA is a national trade association representing the tire and rubber industry with a membership of approximately 200 companies which employ approximately a quarter-million workers. Member companies produce some 40,000 products including tires, tubes, hose, belts, footwear, roll covering, gaskets, sealing devices, hospital and surgical supplies and sports equipment. RMA members account for approximately 90 percent of all rubber production in the United States. The rubber industry is a major user of chemicals and, as such, has a longstanding interest in and commitment to the control of hazardous and toxic waste.

The RMA supports the reauthorization of Superfund. However, we believe that funding levels should be based on realistic assessments of the Environmental Protection Agency's ("EPA") annual spending needs. Funding levels in S.51 appear to be excessive. Overfunded and inefficient programs have no place in the critical national task of cleaning up abandoned hazardous waste sites. Hazardous and toxic sites must be cleaned up in order to protect the nation's health and environment. However, burdening the Superfund program with excessive funds or additional tasks will only detract from this goal.

As stated above, RMA maintains that the \$7.5 billion authorization level called for by S.51 is excessive and has not been justified. A more realistic and more workable funding level than that contained in the subject bill would be \$1 billion per annum. EPA Administrator Lee Thomas

spoke in similar terms during his confirmation hearing on February 6, 1985, calling for a \$1.1 billion per year level.

RMA believes that it is important for Congress to make a precise determination of what EPA will need over the next five years to successfully manage the cleanup. Congress can best determine what EPA needs for Superfund reauthorization when it:

- 1) examines the accomplishments of the startup effort;
- 2) studies current progress being made to clean up sites; and
- 3) prescribes the manageable resources and goals for the next five years.

In addition to our comments on the funding levels, the RMA wishes to express its strong opposition to a federal victim compensation program.

In conclusion, the RMA wishes to stress that it supports reauthorization of Superfund. That authorization, however, should take place after thorough analysis and should contain balanced funding levels and be restricted to the original purpose of Superfund, namely, the cleanup of waste sites.

Victor O.
Schinnerer
& Company, Inc.

STATEMENT FOR THE RECORD

BY

PAUL L. GENECKI, SENIOR VICE PRESIDENT

VICTOR O. SCHINNERER AND COMPANY, INC.

FOR THE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,

UNITED STATES SENATE

RE: 1985 SUPERFUND REAUTHORIZATION LEGISLATION (S 494)

Victor O. Schinnerer & Co. Inc.
5028 Wisconsin Avenue N.W.
Washington, D.C. 20006
(202) 686-2850

April 11, 1985
Washington, D.C.

Victor O.
Schinnerer
& Company Inc.

STATEMENT FOR THE RECORD
RE: 1985 SUPERFUND REAUTHORIZATION LEGISLATION (S.494)
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE
April 11, 1985

I am Paul L. Genecki, Senior Vice President of Victor O. Schinnerer & Company, Inc., the Program Administrator and Underwriting Manager for the professional liability insurance programs commended for architects and engineers and other design professionals by the American Institute of Architects and the National Society of Professional Engineers. Our firm has served as the professional liability insurance counsellor to AIA and NSPE since 1957, and we presently are the principal underwriting manager in the United States for professional liability insurance for engineers and architects. At this time, we insure more than 6,000 design professional firms.

We are grateful for this opportunity to submit a statement for the record on S.494.

Other witnesses have addressed specific provisions of this Bill and much has been said about insurance and its availability to persons and entities affected by the proposed legislation. Rather than add to the testimony on these matters, I would like to direct the Committee's attention specifically to the professional liability implications of the Bill.

Since the end of World War II, all professions in the United States have seen a substantial increase in the claims made against their members for professional liability or malpractice. Professional liability claims have become a serious professional and financial problem for all professions, irrespective of whether legal liability ultimately is imposed.

Within the professional liability arena, there are three categories of exposure, or types of claims, that confront professionals.

W. O.
Schinnerer²
A Company Inc.

1. Personal injury including bodily injury and death.
2. Damage to tangible property.
3. Intangible financial losses, such as loss of property rental income, loss of mortgage commitments, and losses occasioned by increases in interest rates attributable to delays.

For hospitals, doctors, dentists and other health care providers, the professional liability exposure is almost entirely bodily injury or death and usually involves but a single claimant. Lawyers and accountants have a professional liability exposure that usually encompasses intangible financial loss and, with the exception of SEC related matters, involves a sole claimant. Architects and engineers, however, regularly are confronted with professional liability claims involving multiple parties and arising out of any of these three categories of exposure.

Claims against design professionals alleging losses in all three categories are not atypical. This is the major distinction in the professional liability exposure facing engineers and architects as contrasted to all other classes of professionals. Indeed, it is a unique and very complex exposure. In fact, in claims against design professionals, the cost of the investigation and defense can equal or exceed the original design cost of a project.

To date, the professional liability problem for engineers has been especially complex because of the wide variety of sources from which claims can arise. There are many influences which affect the design professional's daily practice in this regard. Professional liability claims against engineers can result from alleged negligence in the project design or in the preparation of the drawings and specifications. They can arise from services performed during the construction phase while acting as the owner's agent; or from allegedly improper specifications for traditional products used in a new way without adequate testing; or from



the increasing scope of government regulations such as building codes or standards, environmental laws, and regulations related to occupational safety; or from the constraints imposed by time and money in an era of high inflation and interest rates which result in demands for accelerated completion; or, finally, from the changing attitudes of the courts and society in regard to the accountability of professionals for the consequences of their acts.

One way the insurance industry measures this professional liability problem is to look at the frequency of claims. Measuring that frequency in terms of numbers of claims per 100 architecture or engineering firms per year, our records indicate that the frequency in 1960 was 12.5 claims per 100 firms insured in the program which we manage. By 1978, that frequency rate rose to 36.3 claims per 100 insured firms, and to 44.8 in 1980. The rate has held at 44 since then. Put another way, the "risk" probability is that close to one-half of all design professional firms will experience a professional liability claim in 1985. A majority of claims are disposed of without the need for any indemnity payment by the insurance companies, but the services of defense attorneys and expert witnesses, and the time spent by a design professional to establish a successful defense, can be extremely costly. This cost is usually borne by the engineer under his insurance policy deductible or out of pocket. As can be seen, this overwhelming increase in claim frequency is a particularly acute problem for design professionals.

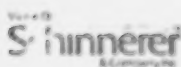
The other major parameter used to measure professional liability is the severity of claims. This quantifies the cost of claims. (Frequency quantifies the number of claims.) Starting at the same point used above to measure claim frequency, 1960, the value of an average claim was \$5,481. This amount is derived by dividing the total incurred loss for the claims by the total number of paid claims. This amount is in excess of the insureds' deductibles and reflects only the insurance company's claim experience in the first \$250,000 layer of insurance. By 1978, the average claim had reached \$43,659. When all of the 1985 claims have been reported and resolved, the actuaries tell us that that average will exceed \$70,000.



You already have heard from other witnesses that the cost of professional liability insurance truly is a burden to engineers and other design professionals. The cost of professional liability insurance to an architect or engineer, in addition to their obligation to pay substantial deductibles, is somewhere in the range of 4% to more than 15% of gross billings. The cost of professional liability insurance, after personnel or salary costs, is the highest expense item for many engineers.

It is important to understand how engineers' professional liability insurance policies are written to understand the impact on design professionals. These insurance policies are written on a "claims-made" basis -- i.e., the insurance must be in force when the claim is made, irrespective of when the professional services were performed. And, these policies contain substantial deductibles on a per claim basis, which apply to both indemnity payments made to a claimant and to the investigative and legal costs incurred in defending against the claim. In many cases, an engineer who is absolved of liability must pay thousands of dollars just to establish the successful defense. Under the insurance program for which we serve as the underwriting manager, the current minimum per claim deductible is \$2,000. The most commonly carried deductibles are in the \$5,000 to \$10,000 range and higher. Rather obviously, any firm that has even a single claim is faced with a substantial financial exposure irrespective of insurance coverage.

Professional Liability Insurance for design professionals is not now, nor at any time in the past has it been, widely available. Within the insurance industry it is considered to be a specialty type of insurance, and a very volatile one at that. Today, professional liability insurance for design professionals is written by only eight insurance companies, one of which is Continental Casualty Company, the company for whom we underwrite. Not all of these eight companies will write coverage in all geographic areas and some limit the availability of their coverage to firms practicing certain types of engineering. As well, it must be recognized that a basic tenet of insurance is an ability to spread the risk over a large number of insured units. The total number of engineering firms



practising in the United States is relatively small and those with the skill and experience to render hazardous waste abatement services is very small. Thus, the base across which the risks inherent in the proposed legislation can be spread is quite small, indeed.

As has been amply demonstrated in previous testimony, the insurance industry in general currently is in a state of rapid and traumatic change. The continued availability of professional liability insurance for engineers performing hazardous waste abatement and related services is not at all certain, under the best of circumstances. In fact, one of our competitors recently introduced a new policy form containing a condition which excludes coverage for claims arising out of such services.

In all of this, as well, the public has a vital interest. There can be little doubt that members of the public as well as professionals' clients are directly benefited by engineers having financial resources in the event of a professional liability claim. If a person is injured or damaged by a design professional's negligence, there can be no meaningful recovery in the absence of insurance or personal assets. If professional liability insurance is not available at any price or if a professional has chosen not to purchase professional liability insurance because of the expense, or has insufficient resources to pay the deductible, the injured person, rather than the professional, will suffer the financial burden.

Despite all of the adverse developments over the past 25 years, including changing standards of practice, constantly expanding judicial interpretations of duties owed, dramatic increases in claim frequency and severity, and vastly increased expectations on the part of design professionals' clients, the professional liability insurance program on manage has been continuously available on a nationwide basis since 1957. Even today, we are confident that the professional liability risks of engineers and architects can be managed successfully and that professional liability insurance availability can be maintained. However,

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what cannot be managed is the uncertainty of underwriting results occasioned by liability that would be vastly expanded, virtually overnight, under the theories of strict, joint and several liability such as can be imputed to the services of engineers under this proposed legislation. Unfortunate though it may be, we are confident in the accuracy of our prediction that if design professionals' liability is to be determined under the theories of strict, joint and several liability, professional liability insurance will no longer be available to these professionals, at any price.

In our opinion, equity demands that engineers who are called upon to help solve an existing problem, in this case hazardous waste abatement, a problem which they neither created nor contributed to in any way, should not be exposed to liability expanded beyond that of traditional negligence standards. Nor, for that matter should any response action contractor, whether rendering professional service or performing the actual abatement procedures, be subjected to expanded theories of liability.

It would be against the public interest to discourage engineers and other design professionals from providing the services so necessary in the hazardous waste abatement process. It would, therefore, seem to us to follow that nothing in the proposed legislation should do anything to increase the burden on engineers and others participating in any clean-up program. We strongly encourage that the current legislation be amended to include the spirit of what has become known as "the Edgar Amendment" to the 1984 legislation. We believe that the spirit and intent of that Amendment is appropriate but we also believe that additional language is necessary to make clear that the protection afforded to response action contractors is available to those entities during the period in which initial services are being provided and before a plan has been approved. In our opinion, it also is extremely important, because of the demonstrated history of judicial interpretation, that the Congress make explicit that it is not the intent of the legislation to expand, in any way, traditional concepts of negligence.

We appreciate this opportunity to present our views. We would welcome the opportunity to further discuss our opinions with the Committee and its staff.

S. 51

IN THE SENATE OF THE UNITED STATES

Mr. STAFFORD (for himself, Mr. CHAFEE, Mr. DURENBERGER, Mr. HUMPHREY, Mr. HART, Mr. MOYNIHAN, Mr. MITCHELL, Mr. BAUCUS, Mr. LAUTENBERG, and Mr. CRANSTON) introduced the following bill; which was read twice and referred to the Committee on Environment and Public Works

A BILL

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That this Act may be referred to as the "Superfund Improve-
4 ment Act of 1985".

TITLE I

INDIAN TRIBES

SEC. 101. (a) Section 101 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 is amended—

1 (1) by striking "and" at the end of paragraph
2 (31), striking the period at the end of paragraph (32),
3 and adding a new paragraph as follows:

4 "(33) 'Indian tribe' means any Indian tribe, band,
5 nation, or other organized group or community, includ-
6 ing any Alaska Native village but not including any
7 Alaska Native regional or village corporation, which is
8 recognized as eligible for the special programs and
9 services provided by the United States to Indians be-
10 cause of their status as Indians; and";

11 (2) in paragraph (16) by striking "or" the last
12 time it appears and by inserting before the semicolon
13 at the end thereof the following: ", any Indian tribe,
14 or, if such resources are subject to a trust restriction
15 on alienation, any member of an Indian tribe".

16 (b) Section 104(c)(3) of the Comprehensive Environmen-
17 tal Response, Compensation, and Liability Act of 1980 is
18 amended by adding at the end thereof the following: "In the
19 case of remedial action to be taken on land or water held by
20 an Indian tribe, held by the United States in trust for Indi-
21 ans, held by a member of an Indian tribe (if such land or
22 water is subject to a trust restriction on alienation), or other-
23 wise within the borders of an Indian reservation, the require-
24 ments of this paragraph for assurances regarding future
25 maintenance and cost-sharing shall not apply, and the Presi-

1 dent shall provide the assurance required by this paragraph
2 regarding the availability of a hazardous waste disposal
3 facility.”.

4 (c) Section 104(d) of the Comprehensive Environmental
5 Response, Compensation, and Liability Act of 1980 is
6 amended by inserting “or Indian tribe” after the phrase “po-
7 litical subdivision thereof” both times that phrase occurs, and
8 by inserting “or Indian tribe” after the phrase “political sub-
9 division” both times that phrase occurs.

10 (d) Section 107 of the Comprehensive Environmental
11 Response, Compensation, and Liability Act of 1980 is
12 amended—

13 (1) in subsection (a) by inserting “or an Indian
14 tribe” after “State”;

15 (2) in subsection (f) by inserting after “State” the
16 third time that word appears the following: “and to
17 any Indian tribe for natural resources belonging to,
18 managed by, controlled by, or appertaining to such
19 tribe, or held in trust for the benefit of such tribe, or
20 belonging to a member of such tribe if such resources
21 are subject to a trust restriction on alienation.”; by in-
22 serting “or Indian tribe” after “State” the fourth time
23 that word appears; by adding before the period at the
24 end of the first sentence the following: “, so long as, in
25 the case of damages to an Indian tribe occurring pursu-

4

1 ant to a Federal permit or license, the issuance of that
2 permit or license was not inconsistent with the fiduci-
3 ary duty of the United States with respect to such
4 Indian tribe"; and by inserting "or the Indian tribe"
5 after "State government";

6 (3) in subsection (i) by inserting "or Indian tribe"
7 after "State" the first time it appears; and

8 (4) in subsection (j) by inserting "or Indian tribe"
9 after "State" the first time it appears.

10 (e) Section 111 of the Comprehensive Environmental
11 Response, Compensation, and Liability Act of 1980 is
12 amended—

13 (1) in subsection (b) by inserting before the period
14 at the end thereof the following: " , or by any Indian
15 tribe or by the United States acting on behalf of any
16 Indian tribe for natural resources belonging to, man-
17 aged by, controlled by, or appertaining to such tribe, or
18 held in trust for the benefit of such tribe, or belonging
19 to a member of such tribe if such resources are subject
20 to a trust restriction on alienation";

21 (2) in subsection (c)(2) by inserting "or Indian
22 tribe" after "State";

23 (3) in subsection (f) by inserting "or Indian tribe"
24 after "State"; and

1 (4) in subsection (i) by inserting after "State," the
2 following: "and by the governing body of any Indian
3 tribe having sustained damage to natural resources be-
4 longing to, managed by, controlled by, or appertaining
5 to such tribe, or held in trust for the benefit of such
6 tribe, or belonging to a member of such tribe if such
7 resources are subject to a trust restriction on
8 alienation,".

9 (f) Section 112(d) of the Comprehensive Environmental
10 Response, Compensation, and Liability Act of 1980 (as re-
11 written by this Act) is amended by adding before the period
12 at the end of the proviso the following: ", nor against an
13 Indian tribe until the United States, in its capacity as trustee
14 for the tribe, gives written notice to the governing body of
15 the tribe that it will not present a claim or commence an
16 action on behalf of the tribe or fails to present a claim or
17 commence an action within the time limitations specified in
18 this subsection".

19 (g) Title I of the Comprehensive Environmental Re-
20 sponse, Compensation, and Liability Act of 1980 is amended
21 by adding at the end thereof the following new section:

22 "INDIAN TRIBES

23 "SEC. 116. The governing body of an Indian tribe shall
24 be afforded substantially the same treatment as a State with
25 respect to the provisions of section 103(a) (regarding notifica-
26 tion of releases), section 104(c)(2) (regarding consultation on

1 remedial actions), section 104(e) (regarding access to infor-
2 mation), section 104(i) (regarding cooperation in establishing
3 and maintaining national registries), and section 105 (regard-
4 ing roles and responsibilities under the national contingency
5 plan and submittal of priorities for remedial action, but not
6 including the provision regarding the inclusion of at least one
7 facility per State on the national priority list).”.

8 COMMUNITY RELOCATION

9 SEC. 102. (a) The second sentence of paragraph (23) of
10 section 101 of the Comprehensive Environmental Response,
11 Compensation, and Liability Act of 1980 is amended by in-
12 serting after “not otherwise provided for,” the phrase “costs
13 of permanent relocation of residents where it is determined
14 that such permanent relocation is cost effective or may be
15 necessary to protect health or welfare,” and by striking out
16 the semicolon at the end thereof and inserting in lieu thereof
17 a period and the following: “In the case of a business located
18 in an area of evacuation or relocation, the term may also
19 include the payment of those installments of principal and
20 interest on business debt which accrue between the date of
21 evacuation or temporary relocation and thirty days following
22 the date that permanent relocation is actually accomplished
23 or, if permanent relocation is formally rejected as the appro-
24 priate response, the date on which evacuation or temporary
25 relocation ceases. In the case of an individual unemployed as
26 a result of such evacuation or relocation, it may also include

1 the provision of assistance identical to that authorized by sec-
2 tions 407, 408, and 409 of the Disaster Relief Act of 1974:
3 *Provided*, That the costs of such assistance shall be paid from
4 the Trust Fund;”.

5 (b) Section 104(c)(1) of the Comprehensive Environmen-
6 tal Response, Compensation, and Liability Act of 1980 is
7 amended by inserting before “authorized by subsection (b) of
8 this section,” the phrase “for permanent relocation or”.

9 **ALTERNATIVE WATER SUPPLIES**

10 **SEC. 103.** Section 101 of the Comprehensive Environ-
11 mental Response, Compensation, and Liability Act of 1980,
12 is amended by striking the period at the end of paragraph
13 (30) and inserting in lieu thereof a semicolon; and by adding
14 after new paragraph (33) the following new paragraph:

15 “(34) ‘alternative water supplies’ includes, but is
16 not limited to, drinking water and household water
17 supplies.”.

18 **STATE CREDIT**

19 **SEC. 104.** (a) Section 104(c)(3) of the Comprehensive
20 Environmental Response, Compensation, and Liability Act of
21 1980 is amended by striking “The President shall grant the
22 State a credit against the share” and all that follows down
23 through the end of such section 104(c)(3) and inserting in lieu
24 thereof the following: “In determining the portion of the
25 costs referred to in this section which is required to be paid
26 by a participating State, the President shall grant the State a

8

1 credit for amounts expended or obligated by such State or by
2 a political subdivision thereof after January 1, 1978, and
3 before December 11, 1980, for any response action costs
4 which are covered by section 111(a) (1) or (2) and which are
5 incurred at a facility or release listed pursuant to section
6 105(8). Such credit shall have the effect of reducing the
7 amount which the State would otherwise be required to pay
8 in connection with assistance under this section.”.

9 (b)(1) Section 104(d)(1) of the Comprehensive Environ-
10 mental Response, Compensation, and Liability Act of 1980 is
11 amended by adding the following new sentence: “For the
12 purposes of the last sentence of subsection (c)(3) of this sec-
13 tion, the President may enter into a contract or cooperative
14 agreement with a State under this paragraph under which
15 such State will take response actions in connection with re-
16 leases listed pursuant to section 105(8)(B), using non-Federal
17 funds for such response actions, in advance of and without
18 any obligation by the President of amounts from the Fund for
19 such response actions.”.

20 (2) Section 104(c)(3) of the Comprehensive Environ-
21 mental Response, Compensation, and Liability Act of 1980 if
22 further amended by adding the following sentence: “The
23 President shall grant the State a credit against the share of
24 costs for which it is responsible under this paragraph for any
25 reasonable, documented, direct out-of-pocket non-Federal

1 funds expended or obligated by the State under a contract or
2 cooperative agreement under the last sentence of subsection
3 (d)(1).”.

4 FUNDING OF REMEDIAL ACTION AT FACILITY OWNED BY A
5 STATE OR POLITICAL SUBDIVISION BUT OPERATED
6 PRIVATELY

7 SEC. 105. Section 104(c)(3) of the Comprehensive Envi-
8 ronmental Response, Compensation, and Liability Act of
9 1980 is amended—

10 (1) by amending section 104(c)(3)(C)(ii) to read as
11 follows:

12 “(ii) 50 per centum (or such greater amount
13 as the President may determine appropriate,
14 taking into account the degree of responsibility of
15 the State or political subdivision for the release) of
16 the capital, future operation, and future mainte-
17 nance costs of the response action relating to a
18 release at a facility, primarily used for treatment,
19 storage, or disposal, that was owned and operated
20 by the State or a political subdivision thereof at
21 the time of any disposal of hazardous substances
22 is such facility. For the purpose of subparagraph
23 (c)(ii) of this paragraph, the term ‘facility’ does
24 not include navigable waters or the beds underly-
25 ing those waters.”; and

1 (2) by adding at the end thereof the following: "In
2 the case of any State which has paid, at any time after
3 the date of the enactment of the Superfund Improve-
4 ment Act of 1985, in excess of 10 per centum of the
5 costs of remedial action at a facility owned but not op-
6 erated by such State or by a political subdivision there-
7 of, the President shall use money in the Fund to pro-
8 vide reimbursement to such State for the amount of
9 such excess."

10 SELECTION OF REMEDIAL ACTIONS

11 SEC. 106. Section 104(c)(4) of the Comprehensive Envi-
12 ronmental Response, Compensation, and Liability Act of
13 1980 is amended to read as follows:

14 “(4)(A) The President shall select appropriate remedial
15 actions determined to be necessary to carry out this section
16 which, to the extent practicable, are in accordance with the
17 national contingency plan and which provide for cost-effec-
18 tive response. In evaluating the cost-effectiveness of pro-
19 posed alternative remedial actions, the President shall take
20 into account the total short- and long-term costs of such ac-
21 tions, including the costs of operation and maintenance for
22 the entire period during which such activities will be
23 required.

24 “(B) Remedial actions in which treatment which signifi-
25 cantly reduces the volume, toxicity or mobility of the hazard-
26 ous substances is a principal element, are to be preferred over

1 remedial actions not involving such treatment. The offsite
2 transport and disposal of hazardous substances or contami-
3 nated materials without such treatment should be the least
4 favored alternative remedial action, where practicable treat-
5 ment technologies are available. •

6 “(C) Remedial actions selected under this paragraph or
7 otherwise required or agreed to by the President under this
8 Act shall attain a degree of cleanup of hazardous substances,
9 pollutants, and contaminants from the environment and of
10 control of further release at a minimum which assures protec-
11 tion of human health and the environment. Such remedial
12 actions shall be relevant and appropriate under the circum-
13 stances presented by the release or threatened release of such
14 substance, pollutant, or contaminant.

15 “(D) No permit shall be required under subtitle C of the
16 Solid Waste Disposal Act for the portion of any removal or
17 remedial action conducted pursuant to this Act entirely
18 onsite: *Provided*, That any onsite treatment, storage, or dis-
19 posal of hazardous substances, pollutants, or contaminants
20 shall comply with the requirements of subparagraph (C).

21 “(E) Subject to the requirements of this paragraph, the
22 President shall select the appropriate remedial action which
23 provides a balance between the need for protection of public
24 health and welfare and the environment at the facility under
25 consideration, and the availability of amounts from the Fund

1 to respond to other sites which present or may present a
2 threat to public health or welfare or the environment, taking
3 into consideration the relative immediacy of such threats."

4 STATE AND FEDERAL CONTRIBUTIONS TO OPERATION AND
5 MAINTENANCE

6 SEC. 107. Section 104(c) of the Comprehensive Envi-
7 ronmental Response, Compensation, and Liability Act of
8 1980 is amended by adding the following new paragraphs:

9 "(5) For the purposes of paragraph (3) of this subsec-
10 tion, in the case of ground or surface water contamination,
11 completed remedial action includes the completion of treat-
12 ment or other measures, whether taken onsite or offsite, nec-
13 essary to restore ground and surface water quality to a level
14 that assures protection of human health and the environment.
15 With respect to such measures, the operation of such meas-
16 ures for a period up to five years after the construction or
17 installation and commencement of operation shall be consid-
18 ered remedial action. Activities required to maintain the ef-
19 fectiveness of such measures following such period or the
20 completion of remedial action, whichever is earlier, shall be
21 considered operation or maintenance.

22 "(6) During any period after the availability of funds
23 received by the Trust Fund under sections 4611 and 4661 of
24 the Internal Revenue Code of 1954 or section 221(b)(2) of
25 this Act, the Federal share of the payment of costs for oper-
26 ation and maintenance pursuant to paragraph (3)(C)(i) or

1 paragraph (5) of this subsection shall be from funds received
2 by the Trust Fund under section 221(b)(1)(B)."

3 SITING OF HAZARDOUS WASTE FACILITIES

4 SEC. 108. Section 104(e) of the Comprehensive Envi-
5 ronmental Response, Compensation, and Liability Act of
6 1980 is amended by adding the following new paragraph:

7 "(7) Effective four years after the date of enactment of
8 this paragraph, the President shall not provide any remedial
9 actions pursuant to this section unless the State in which the
10 release occurs first enters into a contract or cooperative
11 agreement with the President providing assurances deemed
12 adequate by the President that the State will assure the
13 availability of hazardous waste treatment or disposal facilities
14 acceptable to the President and in compliance with the re-
15 quirements of subtitle C of the Solid Waste Disposal Act
16 with adequate capacity for the destruction, treatment, or
17 secure disposition of all hazardous wastes that are reasonably
18 expected to be generated within the State during the twenty-
19 year period following the date of such contract or cooperative
20 agreement and to be disposed of, treated, or destroyed."

21 COOPERATIVE AGREEMENTS

22 SEC. 109. Section 104(d)(1) of the Comprehensive En-
23 vironmental Response, Compensation, and Liability Act of
24 1980 is amended by striking all of the existing paragraph
25 (other than that added by this Act) and substituting the
26 following:

1 “(d)(1) Where the President determines that a State or
2 political subdivision has the capability to carry out any or all
3 of the actions authorized in this section, the President may,
4 in his discretion, enter into a contract or cooperative agree-
5 ment and combine any existing cooperative agreements with
6 such State or political subdivision to take such actions in ac-
7 cordance with criteria and priorities established pursuant to
8 section 105(8) of this title and to be reimbursed from the
9 Fund for the reasonable response costs and related activities
10 associated with the overall implementation, coordination, en-
11 forcement, training, community relations, site inventory and
12 assessment efforts, and administration of remedial activities
13 authorized by this Act. Any contract made hereunder shall be
14 subject to the cost-sharing provisions of subsection (c) of this
15 section.”.

16 HEALTH-RELATED AUTHORITIES

17 SEC. 110. (a) Section 104(i) of the Comprehensive En-
18 vironmental Response, Compensation, and Liability Act of
19 1980 is amended by inserting “(1)” after “(i)”, by redesignat-
20 ing paragraphs (1), (2), (3), (4), and (5) as subparagraphs (A),
21 (B), (C), (D), and (E), and by adding the following new para-
22 graphs:

23 “(2) The Agency for Toxic Substances and Disease
24 Registry shall provide consultations upon request on health
25 issues relating to exposure to hazardous or toxic substances,
26 on the basis of available information, to the Environmental

1 Protection Agency, State officials, and local officials. Such
2 consultations to individuals may be provided by States under
3 cooperative agreements established under this Act.

4 “(3)(A) The Administrator shall perform a health assess-
5 ment for each release, threatened release or facility on the
6 National Priority List established under section 105. Such
7 health assessment shall be completed not later than two
8 years after the date of enactment of the Superfund Improve-
9 ment Act of 1985 for each release, threatened release or fa-
10 cility proposed for inclusion on such list prior to such date of
11 enactment or not later than one year after the date of propos-
12 al for inclusion on such list for each release, threatened re-
13 lease or facility proposed for inclusion on such list after such
14 date or enactment. The Administrator shall also perform a
15 health assessment for each facility for which one is required
16 under section 3005(j) of the Solid Waste Disposal Act and,
17 upon request of the Administrator of the Environmental Pro-
18 tection Agency or a State, for each facility subject to this Act
19 or subtitle C of the Solid Waste Disposal Act, where there is
20 sufficient data as to what hazardous substances are present in
21 such facility.

22 “(B) The Administrator may perform health assess-
23 ments for releases or facilities where individual persons or
24 licensed physicians provide information that individuals have
25 been exposed to a hazardous substance, for which the proba-

1 ble source of such exposure is a release. In addition to other
2 methods (formal or informal) of providing such information,
3 such individual persons or licensed physicians may submit a
4 petition to the Administrator providing such information and
5 requesting a health assessment. If such a petition is submit-
6 ted and the Administrator does not initiate a health assess-
7 ment, the Administrator shall provide a written explanation
8 of why a health assessment is not appropriate.

9 “(C) In determining sites at which to conduct health
10 assessments under this paragraph, the Administrator of the
11 Agency for Toxic Substances and Disease Registry shall give
12 priority to those facilities or sites at which there is document-
13 ed evidence of release of hazardous substances, at which the
14 potential risk to human health appears highest, and for which
15 in the judgment of the Administrator of such Agency existing
16 health assessment data is inadequate to assess the potential
17 risk to human health as provided in subparagraph (E).

18 “(D) Any State or political subdivision carrying out an
19 assessment shall report the results of the assessment to the
20 Administrator of such Agency, and shall include recommen-
21 dations with respect to further activities which need to be
22 carried out under this section. The Administrator of such
23 Agency shall include the same recommendation in a report
24 on the results of any assessment carried out directly by the
25 Agency, and shall issue periodic reports which include the

1 results of all the assessments carried out under this
2 paragraph.

3 “(E) For the purposes of this subsection and section
4 111(c)(4), the term ‘health assessments’ shall include prelimi-
5 nary assessments of the potential risk to human health posed
6 by individual sites and facilities, based on such factors as the
7 nature and extent of contamination, the existence of potential
8 for pathways of human exposure (including ground or surface
9 water contamination, air emissions, and food chain contami-
10 nation), the size and potential susceptibility of the community
11 within the likely pathways of exposure, the comparison of
12 expected human exposure levels to the short-term and long-
13 term health effects associated with identified contaminants
14 and any available recommended exposure or tolerance limits
15 for such contaminants, and the comparison of existing mor-
16 bidity and mortality data on diseases that may be associated
17 with the observed levels of exposure. The assessment shall
18 include an evaluation of the risks to the potentially affected
19 population from all sources of such contaminants, including
20 known point or nonpoint sources other than the site or facili-
21 ty in question. A purpose of such preliminary assessments
22 shall be to help determine whether full-scale health or epide-
23 miological studies and medical evaluations of exposed popula-
24 tions shall be undertaken.

1 “(F) At the completion of each health assessment the
2 Administrator shall provide the Administrator of the Envi-
3 ronmental Protection Agency and each affected State with
4 the results of such assessment, together with any recommen-
5 dations for further action under this subsection or otherwise
6 under this Act.

7 “(G) In any case in which a health assessment per-
8 formed under this paragraph (including one required by sec-
9 tion 3005(j) of the Solid Waste Disposal Act) discloses the
10 exposure of a population to the release of a hazardous sub-
11 stance, the costs of such health assessment may be recovered
12 as a cost of response under section 107 of this Act from per-
13 sons causing or contributing to such release of such hazard-
14 ous substance or, in the case of multiple releases contributing
15 to such exposure, to all such releases.

16 “(4) Whenever, in the judgment of the Administrator, it
17 is appropriate on the basis of the results of a health assess-
18 ment, the Administrator shall conduct a pilot study of health
19 effects for selected groups of exposed individuals, in order to
20 determine the desirability of conducting full scale epidemio-
21 logical or other health studies of the entire exposed popula-
22 tion. Whenever in the judgment of the Administrator it is
23 appropriate on the basis of the results of such pilot study, the
24 Administrator shall conduct such full scale epidemiological or
25 other health studies as may be necessary to determine the

1 health effects for the population exposed to hazardous sub-
2 stances in a release or suspected release.

3 “(5) In any case in which the results of a health assess-
4 ment indicate a potential significant risk to human health, the
5 Administrator shall consider whether the establishment of a
6 registry of exposed persons would contribute to accomplish-
7 ing the purposes of this subsection, taking into account cir-
8 cumstances bearing on the usefulness of such a registry, in-
9 cluding the seriousness or unique character of identified dis-
10 eases or the likelihood of population migration from the af-
11 fected area.

12 “(6) The Administrator shall conduct a study, and
13 report to the Congress within two years after the date of
14 enactment of the Superfund Improvement Act of 1985, on
15 the usefulness, costs, and potential implications of medical
16 surveillance programs as a part of the health studies author-
17 ized by this section. Such study shall include, at a minimum,
18 programs which identify diseases for which an exposed popu-
19 lation is at excess risk, provide periodic medical testing to
20 screen for such diseases in subgroups of the exposed popula-
21 tion at highest risk, and provide for a mechanism to refer for
22 treatment individuals who are diagnosed as having such
23 diseases.

24 “(7) If a health assessment or other study carried out
25 under this subsection contains a finding that the exposure

1 concerned presents a significant risk to human health, the
2 President shall take such steps as may be necessary to reduce
3 such exposure and eliminate or substantially mitigate the sig-
4 nificant risk to human health. Such steps may include the use
5 of any authority under this Act, including, but not limited
6 to—

7 “(1) provision of alternative water supplies, and

8 “(2) permanent or temporarily relocation of
9 individuals.

10 “(8) In any case which is the subject of a petition, a
11 health assessment or study, or a research program under this
12 subsection, nothing in this subsection shall be construed to
13 delay or otherwise affect or impair the authority of the Presi-
14 dent or the Administrator of the Environmental Protection
15 Agency to exercise any authority vested in the President or
16 such Administrator under any other provision of law (includ-
17 ing, but not limited to, the imminent hazard authority of sec-
18 tion 7003 of the Solid Waste Disposal Act) or the response
19 and abatement authorities of this Act.

20 “(9)(A) The Administrator shall, within six months after
21 the date of enactment of the Superfund Improvement Act of
22 1985, prepare a list of at least one hundred hazardous sub-
23 stances which the Administrator, in his sole discretion, deter-
24 mines are those posing the most significant potential threat to
25 human health due to their common presence at the location

1 of responses under section 104 or at facilities on the National
2 Priority List or in releases to which a response under section
3 104 is under consideration. Within twenty-four months after
4 enactment, the Administrator shall prepare a list of an addi-
5 tional one hundred or more such hazardous substances. The
6 Administrator shall not less often than once every year there-
7 after add to such list other substances which are frequently so
8 found or otherwise pose a potentially significant threat to
9 human health by reason of their physical, chemical, or biolog-
10 ical nature.

11 “(B) For each such hazardous substance listed pursuant
12 to subparagraph (A), the Administrator shall assess whether
13 adequate information on the health effects of such substance
14 is available. For any such substance for which adequate infor-
15 mation is not available (or under development), the Adminis-
16 trator shall assure the initiation of a program of research de-
17 signed to determine the health effects (and techniques for de-
18 velopment of methods to determine such health effects) of
19 such substance. Where feasible, such program shall seek to
20 develop methods to determine the health effects of such sub-
21 stance in combination with other substances with which it is
22 commonly found. Such program shall include, but not be lim-
23 ited to—

24 “(i) laboratory and other studies to determine
25 short, intermediate, and long-term health effects;

1 “(ii) laboratory and other studies to determine
2 organ-specific, site-specific, and system-specific acute
3 and chronic toxicity;

4 “(iii) laboratory and other studies to determine the
5 manner in which such substances are metabolized or to
6 otherwise develop an understanding of the biokinetics
7 of such substances; and

8 “(iv) where there is a possibility of obtaining
9 human data, the collection of such information.

10 “(C) In assessing the need to perform laboratory and
11 other studies, as required by subparagraph (B), the Adminis-
12 trator shall consider—

13 “(i) the availability and quality of existing test
14 data concerning the substance on the suspected health
15 effect in question;

16 “(ii) the extent to which testing already in
17 progress will, in a timely fashion, provide data that
18 will be adequate to support the preparation of toxico-
19 logical profiles as required by subparagraph (F) of this
20 paragraph; and

21 “(iii) such other scientific and technical factors as
22 the Administrator may determine are necessary for the
23 effective implementation of this subsection.

24 “(D) In the development and implementation of any re-
25 search program under this paragraph, the Administrator of

1 the Agency for Toxic Substances and Disease Registry and
2 the Administrator of the Environmental Protection Agency
3 shall coordinate such research program implemented under
4 this paragraph with programs of toxicological testing estab-
5 lished under the Toxic Substances Control Act and the Fed-
6 eral Insecticide, Fungicide and Rodenticide Act. The purpose
7 of such coordination shall be to avoid duplication of effort and
8 to assure that the hazardous substances listed pursuant to
9 this subsection are tested thoroughly at the earliest practica-
10 ble date. Where appropriate in the discretion of the Adminis-
11 trator and consistent with such purpose, a research program
12 under this paragraph may be carried out using such programs
13 of toxicological testing.

14 “(E) It is the sense of the Congress that the costs of
15 research programs under this paragraph be borne by the
16 manufacturers of the hazardous substance in question, as re-
17 quired in programs of toxicological testing under the Toxic
18 Substances Control Act. Where this is not practical, the costs
19 of such research programs should be borne by parties respon-
20 sible for the release of the hazardous substance in question.
21 To carry out such intention, the costs of conducting such a
22 research program under this paragraph shall be deemed a
23 cost of response for the purposes of recovery under section
24 107 of such costs from a party responsible for a release of
25 such hazardous substance.

1 “(F) Based on all available information, including data
2 developed and collected on the health effects of hazardous
3 substances under this paragraph, the Administrator shall pre-
4 pare toxicological profiles sufficient to establish the likely
5 effect on human health of each of the substances listed pursu-
6 ant to subparagraph (A). Such profiles shall be revised and
7 republished as necessary, but no less often than once every
8 five years. Such profiles shall be provided to the States and
9 made available to other interested parties.

10 “(10) All studies and results of research conducted
11 under this subsection (other than health assessments) shall be
12 reported or adopted only after appropriate peer review. Such
13 peer review shall be conducted by panels consisting of no less
14 than three nor more than seven members, who shall be disin-
15 terested scientific experts selected for such purpose by the
16 Administrator on the basis of their reputation for scientific
17 objectivity and the lack of institutional ties with any person
18 involved in the conduct of the study or research under
19 review. Support services for such panels shall be provided by
20 the Agency for Toxic Substances and Disease Registry.

21 “(11) In the implementation of this subsection and other
22 health-related authorities of this Act, the Administrator is au-
23 thorized to establish a program for the education of physi-
24 cians and other health professionals on methods of diagnosis
25 and treatment of injury or disease related to exposure to toxic

1 substances, through such means as the Administrator deems
2 appropriate. Not later than one year after the date of enact-
3 ment of the Superfund Improvement Act of 1985, the Ad-
4 ministrator shall report to the Congress on the implementa-
5 tion of this paragraph.

6 “(12) For the purpose of implementing this subsection
7 and other health-related authorities of this Act, the President
8 shall provide adequate personnel to the Agency for Toxic
9 Substances and Disease Registry, which shall be no fewer
10 than one hundred full time equivalent employees.

11 “(13) The activities described in this subsection and sec-
12 tion 111(c)(4) shall be carried out by the Agency for Toxic
13 Substances and Disease Registry established by paragraph
14 (1), either directly, or through cooperative agreements with
15 States (or political subdivisions thereof) in the case of States
16 (or political subdivisions) which the Administrator of such
17 Agency determines are capable of carrying out such activi-
18 ties. Such activities shall include the provision of consulta-
19 tions on health information, and the conduct of health assess-
20 ments, including those required under section 3005(j) of the
21 Solid Waste Disposal Act, health studies and registries.”.

22 (b) Section 111(c)(4) of the Comprehensive Environmen-
23 tal Response, Compensation, and Liability Act of 1980 is
24 amended—

1 (1) by inserting "in accordance with subsection (n)
2 of this section and section 104(i)," after "(4)"; and

3 (2) by striking "epidemiologic studies" and insert-
4 ing in lieu thereof "epidemiologic and laboratory stud-
5 ies and health assessments".

6 (c) Section 111 of the Comprehensive Environmental
7 Response, Compensation, and Liability Act of 1980 is
8 amended by adding at the end thereof the following new sub-
9 section:

10 "(n) For fiscal year 1985, not less than \$18,000,000
11 and, for each fiscal year thereafter, not less than 5 per
12 centum of all sums appropriated from the Trust Fund or
13 \$50,000,000, whichever is less, shall be directly available to
14 the Agency for Toxic Substances and Disease Registry and
15 used for the purpose of carrying out activities described in
16 subsection (c)(4) and section 104(i), including any such activi-
17 ties related to hazardous waste stored, treated, or disposed of
18 at a facility having a permit under section 3025 of the Solid
19 Waste Disposal Act. Any funds so made available which are
20 not obligated by the beginning of the fourth quarter of the
21 fiscal year in which made available shall be made available in
22 the Trust Fund for other purposes."

23 (d) Section 3005 of the Solid Waste Disposal Act is
24 amended by adding the following new subsection:

1 "(j) *Hazardous Information and Release Assess-*
2 *ments.*—(1) Beginning on the date nine months after the
3 enactment of the Solid Waste Disposal Act Amendments of
4 1954, each completed application for a permit under subse-
5 tion (c) for a landfill or surface impoundment shall be accom-
6 panied by information reasonably ascertainable by the owner
7 or operator on the potential for the public to be exposed to
8 hazardous wastes or hazardous constituents through releases
9 related to the unit. At a minimum, such information must
10 address—

11 "(A) reasonably foreseeable potential releases
12 from both normal operations and accidents at the unit,
13 including releases associated with transportation to or
14 from the unit;

15 "(B) the potential pathways of human exposure to
16 hazardous wastes or constituents resulting from the re-
17 leases described under subparagraph (A); and

18 "(C) the potential magnitude and nature of the
19 human exposure resulting from such releases.

20 The owner or operator of a landfill or surface impoundment
21 for which a completed application for a permit under subse-
22 tion (c) has been submitted prior to such date shall submit the
23 information required by this paragraph to the Administrator
24 (or the State, in the case of a State with an authorized pri-

1 gram) no later than the date nine months after such date of
2 enactment.

3 “(2) The Administrator (or the State, in the case of a
4 State with an authorized program) shall make the informa-
5 tion required by paragraph (1), together with other relevant
6 information, available to the Agency for Toxic Substances
7 and Disease Registry established by section 104(i) of the
8 Comprehensive Environmental Response, Compensation, and
9 Liability Act of 1980. Whenever in the judgment of the Ad-
10 ministrator of such Agency, the Administrator, or the State
11 (in the case of a State with an authorized program), a landfill
12 or a surface impoundment poses a substantial potential risk to
13 human health, due to the existence of releases of hazardous
14 constituents, the magnitude of contamination with hazardous
15 constituents which may be the result of a release, or the
16 magnitude of the population exposed to such release or con-
17 tamination, the Administrator of the Agency for Toxic Sub-
18 stances and Disease Registry shall conduct a health assess-
19 ment in connection with such facility in accordance with sec-
20 tion 104(i)(3) of the Comprehensive Environmental Re-
21 sponse, Compensation, and Liability Act of 1980 and take
22 other appropriate action with respect to such risks as author-
23 ized by section 104 (b) and (i) of such Act.

24 “(3) Any member of the public may submit evidence of
25 releases of or exposure to hazardous constituents from such a

1 facility, or as to the risks of health effects associated with
2 such releases or exposure, to the Administrator of the
3 Agency for Toxic Substances and Diseases Registry, the Ad-
4 ministrator, or the State (in the case of a State with an au-
5 thorized program).”.

6 (e) Section 104(i)(1) of the Comprehensive Environmen-
7 tal Response, Compensation, and Liability Act of 1980 is
8 amended by—

9 (1) striking “the Surgeon General of the United
10 States” and inserting in lieu thereof “the Secretary of
11 Health and Human Services”;

12 (2) inserting in the second sentence thereof after
13 “of said Agency” the following: “(hereinafter in this
14 subsection referred to as ‘the Administrator’)”;

15 (3) striking “chromosomal testing” in subpara-
16 graph (D) and inserting in lieu thereof “appropriate
17 testing”.

18 PUBLIC PARTICIPATION

19 SEC. 111. Section 104 of the Comprehensive Environ-
20 mental Response, Compensation, and Liability Act of 1980 is
21 amended by adding at the end thereof the following new sub-
22 section:

23 “(j) Before selection of appropriate remedial action to be
24 undertaken by the United States or a State or before entering
25 into a covenant not to sue or to forebear from suit or other-
26 wise settle or dispose of a claim arising under this Act, notice

1 of such proposed action and an opportunity for a public meet-
2 ing in the affected area, as well as a reasonable opportunity
3 to comment, shall be afforded to the public prior to final
4 adoption or entry. Notice shall be accompanied by a discus-
5 sion and analysis sufficient to provide a reasonable explana-
6 tion of the proposal and alternative proposals considered.”.

7 LOVE CANAL PROPERTY ACQUISITION

8 SEC. 112. Section 104 of the Comprehensive Environ-
9 mental Response, Compensation, and Liability Act of 1980 is
10 amended by adding a new subsection as follows:

11 “(k) In determining priorities among releases and
12 threatened releases under the National Contingency Plan and
13 in carrying out remedial action under this section, the Ad-
14 ministrator shall establish a high priority for the acquisition
15 of all properties (including nonowner occupied residential,
16 commerical, public, religious, and vacant properties) in the
17 area in which, before May 22, 1980, the President deter-
18 mined an emergency to exist because of the release of haz-
19 ardous substances and in which owner occupied residences
20 have been acquired pursuant to such determination.”.

21 NATIONAL CONTINGENCY PLAN—HAZARD RANKING

22 SYSTEM

23 SEC. 113. Section 105 of the Comprehensive Environ-
24 mental Response, Compensation, and Liability Act of 1980 is
25 amended by inserting “(a)” immediately following “105.” and
26 by adding the following at the end thereof:

1 “(b) Not later than twelve months after the date of en-
2 actment of the Superfund Improvement Act of 1985, the
3 President shall revise the National Contingency Plan to re-
4 flect the requirements of such amendments. The portion of
5 such Plan known as ‘the National Hazardous Substance Re-
6 sponse Plan’ shall be revised to provide procedures and
7 standards for remedial actions undertaken pursuant to this
8 Act which are consistent with amendments made by the Su-
9 perfund Improvement Act of 1985 relating to the selection of
10 remedial action.

11 “(c) Not later than twelve months after the date of en-
12 actment of the Superfund Improvement Act of 1985 and
13 after publication of notice and opportunity for submission of
14 comments in accordance with section 553 of title 5, United
15 States Code, the President shall by rule promulgate amend-
16 ments to the hazard ranking system in effect on September 1,
17 1984. Such amendments shall assure, to the maximum extent
18 feasible, that the hazard ranking system accurately assesses
19 the relative degree of risk to human health and the environ-
20 ment posed by sites and facilities subject to review. The
21 President shall establish an effective date for the amended
22 hazard ranking system which is not later than eighteen
23 months after the date of enactment of the Superfund Im-
24 provement Act of 1985 and such amended hazard ranking
25 system shall be applied to any site or facility to be newly

1 listed on the National Priority List after the effective date
2 established by the President. Until such effective date of the
3 regulations, the hazard ranking system in effect on Septem-
4 ber 1, 1984, shall continue to full force and effect.”.

5 STATE AND LOCAL GOVERNMENT LIABILITY

6 SEC. 114. Section 107(d) of the Comprehensive Envi-
7 ronmental Response, Compensation, and Liability Act of
8 1980 is amended by inserting “(1)” after “(d)” and adding
9 the following new language:

10 “(2) No State or local government shall be liable under
11 this title for costs or damages as a result of nonnegligent
12 actions taken in response to an emergency created by the
13 release of a hazardous substance, pollutant, or contaminant
14 generated by or from a facility owned by another person.”.

15 CONTRACTOR INDEMNIFICATION

16 SEC. 115. Section 107(e) of the Comprehensive Envi-
17 ronmental Response, Compensation, and Liability Act of
18 1980 is amended by inserting after paragraph (1) the follow-
19 ing new paragraph and redesignating the succeeding para-
20 graph accordingly:

21 “(2) The Administrator may, in contracting or arranging
22 for response action to be undertaken under this Act, agree to
23 hold harmless and indemnify a contracting party against
24 claims, including the expenses of litigation or settlement, by
25 third persons for death, bodily injury or loss of or damage to
26 property arising out of performance of a cleanup agreement

1 to the extent that such claim does not arise out of the negli-
2 gence of the contracting party.”.

3 DIRECT ACTION

4 SEC. 116. (a) Section 108 (c) and (d) of the Comprehen-
5 sive Environmental Response, Compensation and Liability
6 Act of 1980 is amended to read as follows:

7 “(c) In any case where the owner or operator is in bank-
8 ruptcy, reorganization, or arrangement pursuant to the Fed-
9 eral Bankruptcy Code or where with reasonable diligence ju-
10 risdiction in the Federal courts cannot be obtained over an
11 owner or operator likely to be solvent at the time of judg-
12 ment, any claim authorized by section 107 or 111 may be
13 asserted directly against the guarantor providing evidence of
14 financial responsibility. In the case of any action pursuant to
15 this subsection, such guarantor shall be entitled to invoke all
16 rights and defenses which would have been available to the
17 owner or operator if any action had been brought against the
18 owner or operator by the claimant and which would have
19 been available to the guarantor if an action had been brought
20 against the guarantor by the owner or operator.

21 “(d) The total liability under this Act of any guarantor
22 shall be limited to the aggregate amount which the guarantor
23 has provided as evidence of financial responsibility to the
24 owner or operator under this Act: *Provided*, That nothing in
25 this subsection shall be construed to limit any other State or
26 Federal statutory, contractual or common law liability of a

1 guarantor to its owner or operator including, but not limited
2 to, the liability of such guarantor for bad faith either in nego-
3 tiating or in failing to negotiate the settlement of any claim:
4 *Provided further*, That nothing in this subsection shall be
5 construed, interpreted or applied to diminish the liability of
6 any person under section 107 or 111 of this Act or other
7 applicable law.”.

8 (b) Section 108(b)(2) of the Comprehensive Environmen-
9 tal Response, Compensation, and Liability Act of 1980 is
10 amended by adding the following: “Financial responsibility
11 may be established by any one, or any combination, of the
12 following: insurance, guarantee, surety bond, letter of credit,
13 or qualification as a self-insurer. In promulgating require-
14 ments under this section, the President is authorized to speci-
15 fy policy or other contractual terms, conditions, or defenses
16 which are necessary or are unacceptable in establishing such
17 evidence of financial responsibility in order to effectuate the
18 purposes of this Act.”.

19 VICTIM ASSISTANCE PROGRAM

20 SEC. 117.

21 FUND USE OUTSIDE FEDERAL PROPERTY BOUNDARIES

22 SEC. 118. Section 111(e)(3) of the Comprehensive Envi-
23 ronmental Response, Compensation, and Liability Act of
24 1980 is amended by inserting before the period a colon and
25 the following: “*Provided*, That money in the Fund shall be
26 available for the provision of alternative water supplies (in-

cluding the reimbursement of costs incurred by a municipal-
ity) in any case involving groundwater contamination outside
the boundaries of a federally owned facility in which the fed-
erally owned facility is not the only potentially responsible
party.”.

STATUTE OF LIMITATIONS

SEC. 119. Section 112(d) of the Comprehensive Envi-
ronmental Response, Compensation, and Liability Act of
1980 is amended to read as follows:

“(d) No claim may be presented, nor may any action be
commenced, under this title—

“(1) for the costs of response, unless that claim is
presented or action commenced within three years after
the date of completion of the response action;

“(2) for damages under subparagraph (C) of sec-
tion 107(a), unless that claim is presented or action
commenced within three years after the date on which
final regulations are promulgated under section 301(c)
or within three years after the date of the discovery of
the loss and its connection with the release in question
or the date of enactment of this Act, whichever is
later; or

“(3) for any other damages, unless that claim is
presented or action commenced within three years after
the date of the discovery of the loss and its connection
with the release in question or the date of enactment of

1 this Act, whichever is later: *Provided, however,* That
2 the time limitations contained in this paragraph shall
3 not begin to run against a minor until he reaches
4 eighteen years of age or a legal representative is duly
5 appointed for him, nor against an incompetent person
6 until his incompetency ends or a legal representative is
7 duly appointed for him. No claim may be presented or
8 action be commenced under this paragraph for any
9 damages if, prior to the date of enactment of the Su-
10 perfund Improvement Act 1985, the statute of limita-
11 tions which would otherwise apply under this para-
12 graph has expired.”.

13 JUDICIAL REVIEW

14 “SEC. 120. Section 113(a) of the Comprehensive Envi-
15 ronmental Response, Compensation, and Liability Act of
16 1980 is amended to read as follows:

17 “Sec. 113. (a)(1) Review of any regulation promulgated
18 under this Act may be had upon application by any interested
19 person in the Circuit Court of Appeals of the United States
20 for the District of Columbia or in any United States court of
21 appeals for a circuit in which the applicant resides or trans-
22 acts business which is directly affected by such regulation.
23 Any such application shall be made within one hundred and
24 twenty days from the date of promulgation of such regula-
25 tion, or after such date only if such application is based solely
26 on grounds which arose after such one hundred and twentieth

1 day. Any matter with respect to which review could have
2 been obtained under this subsection shall not be subject to
3 judicial review in any civil or criminal proceeding for enforce-
4 ment or to obtain damages or recovery of response costs.

5 “(2)(A) If applications for review of the same agency
6 action have been filed in two or more United States courts of
7 appeals and the Administrator has received written notice of
8 the filing of the first such application more than thirty days
9 before receiving written notice of the filing of the second ap-
10 plication, then the record shall be filed in that court in which
11 the first application was filed. If applications for review of the
12 same agency action have been filed in two or more United
13 States courts of appeals and the Administrator has received
14 written notice of the filing of one or more applications within
15 thirty days or less after receiving written notice of the filing
16 of the first application, then the Administrator shall promptly
17 advise in writing the Administrative Office of the United
18 States courts that applications have been filed in two or more
19 United States courts of appeals, and shall identify each court
20 for which he has written notice that such applications have
21 been filed within thirty days or less of receiving written
22 notice of the filing of the first such application. Pursuant to a
23 system of random selection devised for this purpose, and
24 within three business days after receiving such notice from
25 the Administrator, the Administrative Office thereupon shall

1 select the court in which the record shall be filed from among
2 those identified by the Administrator. Upon notification of
3 such selection, the Administrator shall promptly file the
4 record in such court. For the purpose of review of agency
5 action which has previously been remanded to the Adminis-
6 trator, the record shall be filed in the United States court of
7 appeals which remanded such action.

8 “(B) Where applications have been filed in two or more
9 United States courts of appeals with respect to the same
10 agency action and the record has been filed in one of such
11 courts pursuant to subparagraph (A), the other courts in
12 which such applications have been filed shall promptly trans-
13 fer such applications to the United States court of appeals in
14 which the record has been filed. Pending selection of a court
15 pursuant to subparagraph (A), any court in which an applica-
16 tion has been filed may postpone the effective date of the
17 agency action until fifteen days after the Administrative
18 Office has selected the court in which the record shall be
19 filed.

20 “(C) Any court in which an application with respect to
21 any agency action has been filed, including any court selected
22 pursuant to subparagraph (A), may transfer such application
23 to any other United States court of appeals for the conven-
24 ience of the parties or otherwise in the interest of justice.”.

1 CLARIFICATION OF PREEMPTION LANGUAGE

2 SEC. 121. Section 114(c) of the Comprehensive Envi-
3 ronmental Response, Compensation, and Liability Act of
4 1980 is amended by inserting after the first sentence thereof
5 the following: "Nothing in this section shall preclude any
6 State from requiring any person to contribute to a fund to
7 pay (1) the costs of the non-Federal share or other State
8 responsibilities under section 104(c)(3), or (2) the direct and
9 indirect costs of response actions at facilities or locations
10 where the President has not responded under this Act or in
11 addition to response actions taken under this Act, or, (3) any
12 other management, enforcement, or administration activities
13 related to response actions or other cleanup of hazardous sub-
14 stances or hazardous wastes."

15 FEDERAL FACILITIES

16 SEC. 122. Section 115 of the Comprehensive Environ-
17 mental, Compensation, and Liability Act of 1980 is amended
18 by inserting before the period at the end thereof a colon and
19 the following: "*Provided*, That with respect to a Federal fa-
20 cility or activity for which such duties or powers are delegat-
21 ed to an officer, employee or representative of the depart-
22 ment, agency or instrumentality which owns or operates such
23 facility or conducts such activity, the concurrence of the Ad-
24 ministrator (and the responsible State official where a cooper-
25 ative agreement has been entered into) shall be required for
26 the selection of appropriate remedial action and the adminis-

1 trative order authorities of section 106(a) are hereby delegat-
2 ed to the Administrator”.

3 ADMINISTRATIVE CONFERENCE RECOMMENDATION

4 SEC. 123. The Congress finds that recommendation 84-
5 4 of the Administrative Conference of the United States
6 (adopted June 29, 1984), is generally consistent with the
7 goals and purposes of the Comprehensive Environmental Re-
8 sponse, Compensation, and Liability Act of 1980, and that
9 the Administrator should consider such recommendation and
10 implement it to the extent that the Administrator determines
11 that such implementation will expedite the cleanup of hazard-
12 ous substances which have been released into the environ-
13 ment.

14 AUTHORIZATION OF APPROPRIATIONS

15 SEC. 124. (a) Section 221 of the Comprehensive Envi-
16 ronmental Response, Compensation, and Liability Act of
17 1980 is amended by striking “as provided in this section” in
18 subsection (a); striking paragraphs (2) and (3) of subsection
19 (b); and by striking subsection (c).

20 (b) Section 303 of the Comprehensive Environmental
21 Compensation and Liability Act of 1980 is amended to read
22 as follows:

23 “AUTHORIZATION OF APPROPRIATIONS

24 “SEC. 303. (a) There are hereby authorized to be appro-
25 priated, out of any money in the Treasury not otherwise ap-

1 appropriated, to the Emergency Response Fund for fiscal
2 year—

3 “(A) 1981, \$44,000,000,

4 “(B) 1982, \$44,000,000,

5 “(C) 1983, \$44,000,000,

6 “(D) 1984, \$44,000,000,

7 “(E) 1985, \$44,000,000,

8 “(F) 1986, \$206,000,000,

9 “(G) 1987, \$206,000,000,

10 “(H) 1988, \$206,000,000,

11 “(I) 1989, \$206,000,000, and

12 “(J) 1990, \$206,000,000,

13 plus for each fiscal year an amount equal to so much of the
14 aggregate amount authorized to be appropriated under sub-
15 paragraphs (A) through (I) as has not been appropriated
16 before the beginning of the fiscal year involved.”.

17 “(b) TRANSFER OF FUNDS.—There shall be transferred
18 to the Response Trust Fund—

19 “(1) one-half of the unobligated balance remaining
20 before the date of the enactment of this Act under the
21 Fund in section 341 of the Clean Water Act, and

22 “(2) the amounts appropriated under section
23 504(b) of the Clean Water Act during any fiscal year.

24 “(C) EXPENDITURES FROM RESPONSE TRUST
25 FUND.—

1 “(1) IN GENERAL.—Amounts in the Response
2 Trust Fund shall be available in connection with re-
3 leases or threats of releases of hazardous substances
4 into the environment only for purposes of making ex-
5 penditures which are described in section 111 (other
6 than subsection (j) thereof of this Act, as in effect on
7 the date of the enactment of the Superfund Improve-
8 ment Act of 1985, including—

9 “(A) response costs,

10 “(B) claims asserted and compensable but
11 unsatisfied under section 311 of the Clean Water
12 Act,

13 “(C) claims for injury to, or destruction or
14 loss of, natural resources, and

15 “(D) related costs described in section 111(c)
16 of this Act.

17 “(2) LIMITATIONS ON EXPENDITURES.—At least
18 85 per centum of the amounts appropriated to the Re-
19 sponse Trust Fund shall be reserved—

20 “(A) for the purposes specified in paragraphs
21 (1), (2), and (4) of section 111(a) of this Act, and

22 “(B) for the repayment of advances made
23 under section 223(c), other than advances subject
24 to the limitation of section 223(c)(2)(C).

99TH CONGRESS
1ST SESSION

S. 494

To amend the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 to assure adequate funding for the cleanup of abandoned hazardous waste sites, and for other purposes.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 22 (legislative day, FEBRUARY 18), 1985

Mr. STAFFORD (by request) introduced the following bill; which was read twice and referred to the Committee on Environment and Public Works

A BILL

To amend the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 to assure adequate funding for the cleanup of abandoned hazardous waste sites, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 SHORT TITLE AND TABLE OF CONTENTS

4 SECTION 1. This Act, together with the following table
5 of contents, may be cited as the "Comprehensive Environ-
6 mental Response, Compensation, and Liability Act Amend-
7 ments of 1985".

TABLE OF CONTENTS

Sec. 1. Short title and table of contents.

- Sec. 2. Amendment of CERCLA.
- Sec. 3. Statement of findings and purposes.
- Sec. 4. Definitions.

TITLE I—PROVISIONS RELATING PRIMARILY TO RESPONSE

- Sec. 101. Authority to respond; scope of program.
- Sec. 102. Statutory limits on removals.
- Sec. 103. Permanent remedies.
- Sec. 104. Offsite remedial action.
- Sec. 105. National contingency plan.
- Sec. 106. Cooperative agreements.
- Sec. 107. Publicly operated facilities.
- Sec. 108. Siting of hazardous waste facilities.
- Sec. 109. Community involvement.
- Sec. 110. Health related authorities.
- Sec. 111. Compliance with other environmental laws.
- Sec. 112. Actions under the national contingency plan.
- Sec. 113. Natural resources damages.
- Sec. 114. Response claims.
- Sec. 115. Indian tribes.
- Sec. 116. Preemption.
- Sec. 117. State cost share.

TITLE II—PROVISIONS RELATING PRIMARILY TO ENFORCEMENT

- Sec. 201. Civil penalties for non-reporting.
- Sec. 202. Contribution and parties to litigation.
- Sec. 203. Access and information gathering.
- Sec. 204. Administrative orders for section 104(b) actions.
- Sec. 205. Non-Trust Fund and Pre-Trust Fund expenditures.
- Sec. 206. Statute of limitations.
- Sec. 207. Pre-enforcement review.
- Sec. 208. National service of process.
- Sec. 209. Abatement action.
- Sec. 210. Federal lien.
- Sec. 211. Penalties.
- Sec. 212. Federal agency settlements.
- Sec. 213. Foreign vessels.

TITLE III—AMENDMENTS TO THE INTERNAL REVENUE CODE OF 1954

[Reserved]

TITLE IV—MISCELLANEOUS PROVISIONS

- Sec. 401. Applicability of amendments.

- 1 AMENDMENT OF CERCLA
- 2 SEC. 2. Except as otherwise expressly provided, when-
- 3 ever in title I, II, or IV of this Act an amendment or repeal
- 4 is expressed in terms of an amendment to or repeal of a sec-

1 tion or other provision, the reference shall be considered to
2 be a reference to a section or provision of the Comprehensive
3 Environmental Response, Compensation, and Liability Act of
4 1980 (42 U.S.C. 9601 et seq.).

5 STATEMENT OF FINDINGS AND PURPOSES

6 SEC. 3. (a) The Congress hereby finds that—

7 (1) releases and threats of releases of hazardous
8 substances continue to pose a serious threat to public
9 health and the environment; and

10 (2) a major source of such threat is uncontrolled
11 hazardous waste facilities, where hazardous substances
12 have been disposed of in a manner that has resulted in,
13 or that may in the future result in dangerous releases.

14 (b) In order to adequately protect human health and the
15 environment from such releases, the Congress further finds it
16 necessary to—

17 (1) continue a comprehensive Federal program fo-
18 cused on the cleanup of hazardous waste sites and re-
19 leases or threatened releases of hazardous substances
20 into the environment;

21 (2) strengthen existing enforcement authority so
22 that responsible parties will bear responsibility for
23 cleanup costs;

24 (3) create a viable and effective Federal-State
25 partnership for cleanup efforts; and

4

(4) ensure that citizens be informed of and have an opportunity to comment on cleanup activities taking place within their community.

DEFINITIONS

SEC. 4. Section 101(14)(C) is amended by striking "hazardous waste" and inserting "substance" in lieu thereof, and by inserting "whether or not that substance would be considered a solid waste under the Act" after "Act" the first time that word appears.

TITLE I—PROVISIONS RELATING PRIMARILY TO
RESPONSE

AUTHORITY TO RESPOND: SCOPE OF PROGRAM

SEC. 101. (a) Section 104(a)(1) is amended to read as follows:

"(a)(1) Whenever any hazardous substance is released or there is a substantial threat of such a release into the environment which may present a risk to public health or the environment, the President is authorized to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance at any time (including its removal from any contaminated natural resource), or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or the environment. The President shall give primary attention to those releases which he deems may

5

1 present a public health threat. The President, in his discre-
2 tion, may authorize the owner or operator of the vessel or
3 facility from which the release or substantial threat of release
4 emanates, or any other responsible party, to perform the re-
5 sponse action if the President determines that such removal
6 or remedial action will be done properly by the owner, opera-
7 tor, or other responsible party.”.

8 (b) Section 104(a) is further amended by striking para-
9 graph (2) and inserting in lieu thereof the following:

10 “(2) The President shall not respond under this Act to a
11 release or threat of a release—

12 “(A) resulting from the extraction, beneficiation,
13 or processing of ores and minerals which are covered
14 under the Surface Mine Control and Reclamation Act
15 of 1977;

16 “(B) resulting from the lawful application of a
17 pesticide product registered under section 3, permitted
18 under section 5, or exempted under section 18 of the
19 Federal Insecticide, Fungicide, and Rodenticide Act;

20 “(C) to the extent it affects residential dwellings,
21 business or community structures, or public or private
22 domestic water supply wells, unless the release or
23 threatened release emanates from a vessel or facility
24 used for the deposition, storage, processing, treatment,
25 transportation, or disposal of hazardous substances;

1 “(D) of a naturally occurring substance in its un-
2 altered form, or altered solely through naturally occur-
3 ring processes or phenomena, from a location where it
4 is naturally found; or

5 “(E) covered by and in compliance with a permit,
6 as that term is defined in section 101(10), if such haz-
7 ardous substance was specifically identified, reviewed,
8 and made part of the public record in issuing the
9 permit and the permit was designed to limit such sub-
10 stance.

11 “(3) Notwithstanding paragraph (2) of this subsection,
12 the President may respond to any release or threat of release
13 of a hazardous substance in any form if he determines, in his
14 discretion, that the release or threat of release constitutes a
15 major public health or environmental emergency and that no
16 other person has the authority or capability to respond to the
17 emergency in a timely manner.”.

18 (c) Section 104(b) is amended by striking the
19 phrases, “, pollutant, or contaminant” and “, pollutants or
20 contaminants” whenever they appear.

21 (d) Section 105 is amended by striking “, pollutant and
22 contaminants,”.

23 STATUTORY LIMITS ON REMOVALS

24 SEC. 102. Section 104(c)(1) is amended by striking “six
25 months” and inserting “one year” in lieu thereof and insert-
26 ing before “obligations” the following: “or (C) continued re-

1 sponse action is otherwise appropriate and consistent with
2 permanent remedy,”.

3 PERMANENT REMEDIES

4 SEC. 103. (a) Section 104(c)(4) is amended by adding at
5 the end thereof the following sentence: “For determining
6 whether a remedy is cost effective, the President may consid-
7 er the permanence of such remedy.”.

8 (b) Section 105(3) is amended by inserting before the
9 semicolon at the end thereof the following: “, taking into
10 account the permanence of any remedial measures”.

11 OFFSITE REMEDIAL ACTION

12 SEC. 104. Section 101(24) is amended by striking the
13 last sentence of the paragraph; striking the period after “wel-
14 fare” the third time that word appears, and inserting a semi-
15 colon in lieu thereof, striking “or” before “contaminated ma-
16 terials” and inserting “and associated” in lieu thereof; and
17 inserting before the period after “environment” the third
18 time that word appears, the following: “, as well as the off-
19 site transport and offsite storage, treatment, destruction, or
20 secure disposition of hazardous substances and associated
21 contaminated materials.”.

22 NATIONAL CONTINGENCY PLAN

23 SEC. 105. (a) Section 105(8)(B), is amended by striking
24 “at least four hundred of” when it appears.

25 (b) Section 105(8)(B) is further amended by striking the
26 phrase “at least” following the word “facilities” the second

1 time it appears and by inserting "A State shall be allowed to
2 designate its highest priority facility only once." after the
3 third full sentence thereof.

4 **COOPERATIVE AGREEMENTS**

5 SEC. 106. (a) Section 104(d)(1) is amended to read as
6 follows:

7 "(d)(1) Where the President determines that a State or
8 political subdivision thereof has the capability to carry out
9 any or all of the actions authorized in this section, the Presi-
10 dent, in his discretion and subject to such terms as he may
11 prescribe, may enter into a contract or cooperative agree-
12 ment covering a specific facility or facilities with such State
13 or political subdivision to take such actions in accordance
14 with criteria and priorities established pursuant to section
15 105(8) of this title and to be reimbursed from the Fund for
16 reasonable response costs incurred pursuant to such contract
17 or cooperative agreement. Any contract or cooperative
18 agreement made hereunder is subject to the cost-sharing pro-
19 visions of subsection (c) of this section."

20 (b) Section 101(25) is amended by striking "and" and by
21 inserting before the semicolon at the end thereof the follow-
22 ing: ", and enforcement activities related thereto".

23 **PUBLICLY OPERATED FACILITIES**

24 SEC. 107. Section 104(c)(3)(C)(ii) is amended to read as
25 follows:

1 “(ii) at least 75 per centum or such greater
2 amount as the President may deem appropriate, taking
3 into account the degree of responsibility of the State or
4 political subdivision, of any sums expended in response
5 to a release from a facility, that was operated by the
6 State or a political subdivision thereof, either directly
7 or through a contractual relationship or otherwise, at
8 the time of any disposal of hazardous substances there-
9 in. For purposes of this clause only, ‘facility’ does not
10 include navigable waters or the beds underlying those
11 waters.”.

12 SITING OF HAZARDOUS WASTE FACILITIES

13 SEC. 108. Section 104(c) is amended by adding at the
14 end thereof the following new paragraph:

15 “(5)(A) Effective two years after the date of enactment
16 of this paragraph, the President shall not initiate any re-
17 sponse actions pursuant to this section, except for the provi-
18 sion of alternative drinking water supplies or the temporary
19 relocation of affected individuals from their residential dwell-
20 ings, neither to exceed one year, unless the State in which
21 the release occurs first provides assurances deemed adequate
22 by the President that the State will assure the availability of
23 hazardous waste treatment or disposal facilities, either within
24 that State or pursuant to a regional agreement, acceptable to
25 the President with adequate capacity for the treatment, or
26 disposal of all hazardous wastes that are reasonably expected

1 to be generated within that State during a period of time
2 specified by the President by regulation.

3 “(B)(i) Notwithstanding subparagraph (A) of this para-
4 graph, the President may take response action under this sec-
5 tion if he determines, in his discretion, that a major public
6 health or environmental emergency exists.

7 “(ii) Notwithstanding subsection (c) of this section, the
8 President shall not provide alternative drinking water sup-
9 plies or the temporary relocation of affected individuals from
10 their residential dwelling pursuant to subparagraph (A) of
11 this paragraph or response pursuant to subparagraph (B)(1) of
12 this paragraph, unless the State in which the release occurs
13 provides assurances that the State will pay or assure pay-
14 ment of 40 per centum of those costs, or at least 80 per
15 centum of those costs for actions related to facilities operated
16 by the State or a political subdivision thereof, either directly
17 or through a contractual relationship or otherwise, at the
18 time of any disposal of hazardous substances therein.

19 “(C) Effective on the date of enactment of this para-
20 graph, in addition to the cost share required by paragraph (3)
21 of this subsection, the State shall pay all additional costs as-
22 sociated with any out-of-State or, if the State is party to a
23 regional agreement for the treatment or disposal of hazardous
24 substances, out-of-region transportation of hazardous sub-

1 stances resulting from response actions taken pursuant to this
2 section.”.

3 COMMUNITY INVOLVEMENT

4 SEC. 109. Section 104(c) is amended by adding after
5 new paragraph (5) the following new paragraph:

6 “(6) Before selection or approval of any remedial action
7 to be undertaken by the United States or a State or any other
8 person under this section or section 106 of this Act, notice of
9 and an opportunity to comment on the proposed action shall
10 be afforded to the public.”.

11 HEALTH RELATED AUTHORITIES

12 SEC. 110. (a) Section 104(i) is amended by inserting
13 “(1)” after “(i)”; striking the remaining part of the sentence
14 following “Registry”, and inserting a period in lieu thereof;
15 inserting “(A)” before the second sentence of subsection (i);
16 and adding the following:

17 “(i) in support of response actions and because of
18 the immediate need to protect public health in the
19 event of a release or threatened release of a hazardous
20 substance, and upon request of the Administrator of
21 the Environmental Protection Agency, State officials,
22 or local officials, may provide health consultations,
23 health assessments, and other technical assistance re-
24 lating to the health effects of exposure to hazardous
25 substances; and

1 “(ii) to improve the ability to render future public
2 health judgments and recommendations, and to further
3 scientific knowledge of the health effects of hazardous
4 substances, develop and conduct epidemiological stud-
5 ies, including pilot studies.”.

6 (b) Section 104(i) is further amended by inserting “(B)”
7 before the third sentence thereof, striking “In addition,” cap-
8 italizing “said”, and striking all of paragraph (1) and insert-
9 ing in lieu thereof the following:

10 “(i) in cooperation with the States, Indian tribes,
11 and with other Federal and local officials, establish and
12 maintain appropriate registries of serious diseases and
13 illnesses or registries of persons exposed to hazardous
14 substances through the environment, whenever their
15 inclusion in such registries would be scientifically ap-
16 propriate or valuable for specific scientific studies or for
17 long-term followup;”.

18 (c) Section 104(i) is further amended by striking “(2)”
19 and inserting “(ii)” in lieu thereof, striking “(3)” and insert-
20 ing “(iii)” in lieu thereof, and striking all of paragraph (4) and
21 inserting in lieu thereof the following:

22 “(iv) in cases of public health emergencies caused
23 or believed to be caused by exposure to toxic sub-
24 stances, assist, and consult with private or public
25 health care providers in the provision of medical care

1 and testing of exposed individuals, including the collec-
2 tion and laboratory analysis of specimens as may be in-
3 dicated by the specific exposure incident or any other
4 assistance appropriate under the circumstances; and”.

5 (d) Section 104(i) is further amended by striking “(5)”
6 and inserting “(v)” in lieu thereof and striking the last sen-
7 tence of the paragraph.

8 (e) Section 104(i) is further amended by adding the fol-
9 lowing new paragraph:

10 “(vi) all results of studies conducted under this
11 subsection (other than health assessments) shall be re-
12 ported or adopted only after appropriate peer review
13 established by the Administrator of the Agency. Exist-
14 ing peer review systems may be used where appro-
15 priate;”.

16 (f) Section 104(i) is further amended by adding the fol-
17 lowing new paragraph at the end thereof:

18 “(2) The Administrator of the Environmental Protection
19 Agency, or the head of the Agency to which response author-
20 ity has been delegated, in his discretion, may perform expo-
21 sure and risk assessments at a release for the purpose of de-
22 termining appropriate action adequate to mitigate the public
23 health threat. For purposes of this paragraph, ‘exposure and
24 risk assessment’ means the process for characterizing the po-
25 tential risk from exposure to hazardous or toxic substances at

1 a specific site, based upon hazard identification, dose-re-
2 sponse assessment, exposure assessment, and risk character-
3 ization.”.

4 COMPLIANCE WITH OTHER ENVIRONMENTAL LAWS

5 SEC. 111. Section 104(c)(4), as amended by section
6 103(a) of this Act, is amended by inserting “(A)” after “(4)”
7 and adding the following new subparagraph at the end there-
8 of:

9 “(B)(i) When revising the national contingency plan pur-
10 suant to section 105, the President shall specify the extent to
11 which removal or remedial actions selected under this section
12 or secured section 106(a) should comply with applicable or
13 relevant standards and criteria of other Federal, State, or
14 local environmental and public health laws. When making
15 this determination, the President shall consider, among other
16 factors, the following: the level of health or environmental
17 protection provided by applicable or relevant standards and
18 criteria; the technical feasibility of achieving such standards
19 and criteria for different types of releases; the interim or per-
20 manent nature of particular response actions; the need for
21 expeditious action; and the need to maintain availability of
22 amounts from the Fund to respond to other releases which
23 present or may present a threat to public health or the
24 environment.

1 “(ii) No permit shall be required under Federal, State,
2 or local law for removal or remedial action selected under
3 this section or secured under section 106(a).

4 “(iii) Removal or remedial actions selected or taken
5 under this section or secured under section 106(a) that have
6 voluntarily met the provisions of section 102 of the National
7 Environmental Policy Act of 1969 (Public Law 91-190, 83
8 Stat. 852) need not comply with any further public participa-
9 tion requirements which may be provided under this Act.”.

10 ACTIONS UNDER THE NATIONAL CONTINGENCY PLAN

11 SEC. 112. Section 107(d) is amended by inserting “re-
12 sponse costs or” before “damages” both times that word ap-
13 pears and by inserting after “person” the second time that
14 word appears the following: “and shall not alter the liability
15 of any person who is liable or potentially liable under subsec-
16 tion (a) of this section who subsequently undertakes a re-
17 sponse action.”.

18 NATURAL RESOURCE DAMAGE CLAIMS

19 SEC. 113. (a) Section 107(f) is amended by inserting
20 “(1)” after “(f)” and by adding at the end thereof the follow-
21 ing new paragraphs:

22 “(2)(A) The President shall designate in the national
23 contingency plan published under section 105 of this Act the
24 Federal officials who shall act on behalf of the public as trust-
25 ees for natural resources under this Act and section 311 of
26 the Clean Water Act. Such officials shall assess damages to

1 natural resources for the purposes of this Act and section 311
2 of the Clean Water Act for those resources under their trust-
3 eeship, and may upon request of and reimbursement from a
4 State and at the Federal officials' discretion, assess damages
5 for those natural resources under a State's trusteeship.

6 “(B) The Governor of each State shall designate the
7 State officials who may act on behalf of the public as trustees
8 for natural resources under this Act and section 311 of the
9 Clean Water Act and shall notify the President of such desig-
10 nations. Such State officials shall assess damages to natural
11 resources for the purposes of this Act and section 311 of the
12 Clean Water Act for those resources under their trusteeship.

13 “(C) Any determination or assessment of damages to
14 natural resources for the purposes of this Act and section 311
15 of the Clean Water Act made by a Federal or State trustee
16 in accordance with the regulations promulgated under section
17 301(c) of this Act shall have the force and effect of a rebutta-
18 ble presumption on behalf of the trustee in any judicial pro-
19 ceeding under this Act or section 311 of the Clean Water
20 Act.

21 “(3) With respect to Federal facilities, Federal agencies
22 with custody and accountability for those facilities shall be
23 the only trustees of natural resources on, under, or above
24 these facilities for purposes of the Act.”.

1 (b) Section 111(b) is amended by inserting a period after
2 "title" the first time that word appears and striking all that
3 follows.

4 (c) Section 111(c) is amended by striking paragraphs (1)
5 and (2) and renumbering the following paragraphs
6 accordingly.

7 (d) Section 111(e)(1) is amended by inserting "pursuant
8 to subsection 111(a)(2)" after the word "Fund" the first time
9 it appears.

10 (e) Section 111 is amended by striking subsections (d),
11 (h), and (i) and relettering the remaining subsections accord-
12 ingly.

13 (f) Section 111(a) is amended by striking paragraph (3)
14 and renumbering the following paragraph.

15 (g) Section 111(e)(4) is amended by striking "Para-
16 graphs (1) and (4) of subsection (a) of" and by replacing "t"
17 with "T" in "this" when it appears.

18 RESPONSE CLAIMS

19 SEC. 114. (a) Section 111(a)(2) is amended to read as
20 follows:

21 "(2) payment of any claim for necessary response
22 costs incurred by any other person as a result of carry-
23 ing out the national contingency plan established under
24 section 311(c) of the Clean Water Act and amended by
25 section 105 of this title: *Provided, however,* That such
26 costs must be approved under said plan and certified by

1 the responsible Federal official prior to the taking of
2 any action for which costs may be sought; and”.

3 (b) Section 112 is amended by striking subsection (a)
4 and inserting in lieu thereof the following:

5 “(a) No claims may be asserted against the Fund pursu-
6 ant to section 111(a)(2) of this title unless such claim is pre-
7 sented in the first instance to the owner, operator, or guaran-
8 tor of the vessel or facility from which a hazardous substance
9 has been released, if known to the claimant, and to any other
10 person known to the claimant who may be liable under sec-
11 tion 107 of this title. In any case where the claim has not
12 been satisfied within sixty days of presentation in accordance
13 with this subsection, the claimant may present the claim to
14 the Fund for payment: *Provided*, That no claim against the
15 Fund may be considered during the pendency of an action in
16 court to recover costs which are the subject of the claim.”.

17 (c) Section 112(b) is amended by striking “\$5,000” in
18 paragraph (1) and inserting “\$25,000” in lieu thereof; and by
19 striking all of paragraphs (2), (3) and (4) and inserting in lieu
20 thereof the following:

21 “(2) The President may, if he is satisfied that the infor-
22 mation developed during the processing of the claim warrants
23 it, make and pay an award of the claim; provided, no claim
24 may be awarded to the extent that a judicial judgment has
25 been made on the costs that are the subject of the claim. If

1 the President declines to pay all or part of the claim, the
2 claimant may, within thirty days after receiving notice of the
3 President's decision, request an administrative hearing.

4 “(3) In any proceeding under this subsection, the claim-
5 ant shall bear the burden of proving his claim.

6 “(4) All administrative decisions made hereunder shall
7 be in writing, with notification to all appropriate parties, and
8 shall be rendered within ninety days of submission of a claim
9 to an administrative law judge, unless all the parties to the
10 claim agree in writing to an extension or unless the Presi-
11 dent, in his discretion, extends the time limit for a period not
12 to exceed sixty days.

13 “(5) All administrative decisions hereunder shall be
14 final, and any party to the proceeding may appeal a decision
15 within thirty days of notification of the award or decision.
16 Any such appeal shall be made to the Federal district court
17 for the district where the release or threat of release took
18 place. In any such appeal, the decision shall be considered
19 binding and conclusive, and shall not be overturned except
20 for arbitrary or capricious abuse of discretion.

21 “(6) Within twenty days after the expiration of the
22 appeal period for any administrative decision concerning an
23 award, or within twenty days after the final judicial determi-
24 nation of any appeal taken pursuant to this subsection, the
25 President shall pay any such award from the Fund. The

1 President shall determine the method, terms, and time of
2 payment.”.

3 (d) Section 112 is amended by striking subsection (d)
4 and relettering the following subsection.

5 INDIAN TRIBES

6 SEC. 115. (a) Section 101 is amended by striking “and”
7 at the end of paragraph (31), striking the period at the end of
8 paragraph (32) and inserting a semicolon in lieu thereof, and
9 adding the following new paragraphs:

10 “(33) ‘Indian tribe’ means any Indian tribe, band,
11 nation, group, pueblo, or community for which, or for
12 the members of which, the United States holds lands in
13 trust; and

14 “(34) ‘Indian lands’ means lands, title to which is
15 held by the United States in trust for an Indian or an
16 Indian tribe or lands title to which is held by an Indian
17 or an Indian tribe subject to a restriction against alien-
18 ation.”.

19 (b) Section 104(c)(3), as amended by section 107 of this
20 Act, is amended by inserting “or Indian tribe” after the word
21 “State” the first four times that word appears and after
22 phrase appears, and by adding a new sentence at the end
23 thereof to read as follows: “The assurances required by this
24 paragraph with respect to Indian lands may be made by the
25 Department of the Interior if the Secretary of the Interior

1 determines that an Indian tribe cannot provide those
2 assurances.”.

3 (c) Section 104(d), as amended by section 106(a) of this
4 Act, is amended by inserting “or Indian tribe” after the
5 phrase “political subdivision thereof” wherever that phrase
6 occurs, and by inserting “or Indian tribe” after the phrase
7 “political subdivision.”.

8 (d) Section 103(a) is amended by striking the period at
9 the end thereof and inserting, “, or to any affected Indian
10 tribe.”

11 (e) Section 104(c)(2) is amended by adding, “or Indian
12 tribe” after “States.”

13 (f) Section 105(8)(B), as amended by section 105 of this
14 Act, is further amended by inserting “or Indian tribe” after
15 “State” the first time that word appears and after the phrase
16 “established by the States”; and inserting “or Indian lands”
17 after “State” the second time that word appears.

18 PREEMPTION

19 SEC. 116. Section 114 is amended by striking subsec-
20 tion (c) and relettering the following subsection accordingly.

21 STATE COST SHARE

22 SEC. 117. Section 104(c)(3)(C)(i) is amended by striking
23 “10” and inserting “20” in lieu thereof.

1 TITLE II—PROVISIONS RELATING PRIMARILY TO
2 ENFORCEMENT

3 CIVIL PENALTIES FOR NONREPORTING

4 SEC. 201. Section 103(b)(3) is amended by striking
5 "\$10,000", inserting "\$25,000" in lieu thereof, and insert-
6 ing before the last sentence the following: "Any such person
7 also shall be liable to the United States for a civil penalty of
8 not more than \$10,000 for each violation of this subsection.
9 Any civil penalty for violations of this subsection in excess of
10 \$25,000 may be assessed in an action brought by the Attor-
11 ney General in a United States district court pursuant to sec-
12 tion 113. The Administrator may assess any penalty under
13 this subsection for less than \$25,000, and such assessment
14 shall become final unless, no later than thirty days after
15 notice of the penalty is served, the person or persons named
16 in the notice request a public hearing. Upon such request, the
17 Administrator shall promptly conduct a public hearing. In
18 connection with any proceeding under this section the Ad-
19 ministrator may issue subpoenas for the attendance and testi-
20 mony of witnesses and the production of relevant papers,
21 books, and documents and may promulgate rules for discov-
22 ery procedures."

23 . CONTRIBUTION AND PARTIES TO LITIGATION

24 SEC. 202. Section 107, as amended by section 205 and
25 title III of this Act, is amended by adding a new subsection
26 to read as follows:

1 “(k)(1) In any civil or administrative action under this
2 section or section 106, any claims for contribution or indem-
3 nification shall be brought only after entry of judgment or
4 date of settlement in good faith.

5 “(2) After judgment in any civil action under section
6 106 or under subsection (a) of this section, any defendant
7 held liable in the action may bring a separate action for con-
8 tribution against any other person liable or potentially liable
9 under subsection (a). Such action shall be brought in accord-
10 ance with section 113 and shall be governed by Federal law.
11 Except as provided in paragraph (4) of the subsection, this
12 subsection shall not impair any right of indemnity under ex-
13 isting law.

14 “(3) When a person has resolved its liability to the
15 United States or a State in a judicially approved good-faith
16 settlement, such person shall not be liable for claims for con-
17 tribution under paragraph (2) of this subsection regarding
18 matters addressed in the settlement. Such settlement does
19 not discharge any of the other potentially liable persons
20 unless its terms so provide, but it reduces the claim against
21 the others to the extent of any amount stipulated by
22 the settlement.

23 “(4) Nothing in this subsection shall affect or modify in
24 any way the rights of the United States, a State, or any
25 person that has resolved its liability to the United States or a

1 State in a good-faith settlement to seek contribution or in-
2 demnification against any persons who are not party to the
3 settlement. In any such contribution or indemnification
4 action, the rights of a State or any person that has so re-
5 solved its liability shall be subordinate to the rights of the
6 United States. Any contribution action brought under this
7 paragraph shall be brought in accordance with section 113
8 and shall be governed by Federal law.”.

9 ACCESS AND INFORMATION GATHERING

10 SEC. 203. Section 104(e) is amended by striking “(2)”
11 and inserting “(3)” in lieu thereof and by striking all of exist-
12 ing paragraph (1) and inserting in lieu thereof the following:

13 “(1) For the purposes of determining the need for re-
14 sponse, or choosing or taking any response action under this
15 title, or otherwise enforcing the provisions of this title, any
16 officer, employee, or representative of the President, duly
17 designated by the President, or any duly designated officer,
18 employee, or representative of a State under a contract or
19 cooperative agreement, is authorized where there is a reason-
20 able basis to believe there may be a release or threat of re-
21 lease of a hazardous substance—

22 “(A) to require any person who has or may have
23 information relevant to (i) the identification or nature of
24 materials generated, treated, stored, transported to, or
25 disposed of at a facility, or (ii) the nature or extent of a
26 release or threatened release of a hazardous substance

1 at or from a facility, to furnish, upon reasonable notice,
2 information or documents relating to such matters. In
3 addition, upon reasonable notice, such person either
4 shall grant to appropriate representatives access at all
5 reasonable times to inspect all documents or records
6 relating to such matters or shall copy and furnish to
7 the representatives all such documents or records, at
8 the option of such person;

9 “(B) to enter at reasonable times any establish-
10 ment or other place of property (i) where hazardous
11 substances are, may be, or have been generated,
12 stored, treated, disposed of, or transported from, (ii)
13 from which or to which hazardous substances have
14 been or may have been released, (iii) where such re-
15 lease is or may be threatened, or (iv) where entry is
16 needed to determine the need for response or the ap-
17 propriate response or to effectuate a response action
18 under this title; and

19 “(C) to inspect and obtain samples from such es-
20 tablishment or other place or property or location of
21 any suspected hazardous substance and to inspect and
22 obtain samples of any containers or labeling for sus-
23 pected hazardous substances. Each such inspection
24 shall be completed with reasonable promptness. If the
25 officer, employee, or representative obtains any sam-

1 ples, prior to leaving the premises, he shall give to the
2 owner, operator, tenant, or other person in charge of
3 the place from which the samples were obtained a re-
4 ceipt describing the sample obtained and, if requested,
5 a portion of each such sample. If any analysis is made
6 of such samples, a copy of the results of the analysis
7 shall be furnished promptly to the owner, operator,
8 tenant, or other person in charge, if such person can be
9 located.

10 “(2)(A) If consent is not granted regarding a request
11 made by a duly designated officer, employee, or representa-
12 tive under paragraph (1), the President, upon such notice and
13 an opportunity for consultation as is reasonably appropriate
14 under the circumstances, may issue an order to such person
15 directing compliance with the request, and the President may
16 ask the Attorney General to commence a civil action to
17 compel compliance.

18 “(B) In any civil action brought to obtain compliance
19 with the order, the court shall, where there is a reasonable
20 basis to believe there may be a release or threat of a release
21 of a hazardous substance (i) in the case of interference with
22 entry or inspection, enjoin such interference or direct compli-
23 ance with orders to prohibit interference with entry or inspec-
24 tion, unless under the circumstances of the case the demand
25 for entry or inspection is arbitrary and capricious, an abuse of

1 discretion, or not in accordance with law; and (ii) in the case
2 of information or document requests, enjoin interference with
3 such information or document requests or direct compliance
4 with orders to provide such information or documents, unless
5 under the circumstances of the case the demand for informa-
6 tion or documents is arbitrary and capricious, an abuse of
7 discretion, or not in accordance with law. The court may
8 assess a civil penalty not to exceed \$10,000 against any
9 person who unreasonably fails to comply with the provisions
10 of paragraph (1) or an order issued pursuant to paragraph (2).

11 “(3) Nothing in this subsection shall preclude the Presi-
12 dent from securing access or obtaining information in any
13 other lawful manner.

14 “(4) Notwithstanding this subsection, entry to locations
15 and access to information properly classified to protect the
16 national security may be granted only to an officer, em-
17 ployee, or representative of the President who is properly
18 cleared.”.

19 ADMINISTRATIVE ORDERS FOR SECTION 104(b) ACTIONS

20 SEC. 204. (a) Section 104 is amended by adding a new
21 subsection at the end thereof to read as follows:

22 “(j)(1) If the President determines that one or more re-
23 sponsible parties will properly carry out action under subsec-
24 tion (b) of this section, the President may enter into a consent

1 administrative order with such party or parties for that
2 purpose.

3 “(2) The United States district court for the district in
4 which the release has occurred or threatens to occur shall
5 have jurisdiction to enforce the order, and any person who
6 violates or fails to obey such an order shall be liable to the
7 United States for a civil penalty of not more than \$10,000 for
8 each day in which such violation occurs or such failure to
9 comply continues.”.

10 (b) Section 107(c)(3) is amended by striking “104 or”.

11 **NON-TRUST FUND AND PRE-TRUST FUND EXPENDITURES**

12 **SEC. 205.** Section 107(a)(4) is amended by striking
13 “and” from the end of subparagraph (B), striking the period
14 from the end of subparagraph (C) and inserting “; and” in
15 lieu thereof, and adding a new subparagraph at the end
16 thereof to read as follows:

17 “(D) All other costs incurred by the United States Gov-
18 ernment subsequent to the enactment of the Resource Con-
19 servation and Recovery Act of 1976, in response to a release
20 or threatened release of a hazardous substance from a facility
21 used for the storage, treatment, or disposal of hazardous sub-
22 stances, where such person knew or should have known of
23 the response action and the costs are not inconsistent with
24 the response actions provided for in subsections 101(23) and
25 (24) of this Act.”.

1 STATUTE OF LIMITATIONS

2 SEC. 206. Section 113, as amended by sections 207 and
3 208 of this Act, is amended by adding at the end thereof the
4 following new subsection:

5 “(h)(1) No claim may be presented nor may an action be
6 commenced under this title for recovery of the costs referred
7 to in subsection (a) of section 107 more than six years after
8 the date of completion of the response action: *Provided, how-*
9 *ever,* That within the limitation period set out herein a State
10 or the United States may commence an action under this title
11 for recovery of any cost or costs at any time after such cost
12 or costs have been incurred.

13 “(2) No action may be commenced for damages under
14 this title more than three years from the date of discovery of
15 the loss.

16 “(3) No action for contribution may be commenced
17 under section 107 more than three years after the date of
18 judgment or the date of the good-faith settlement.

19 “(4) No action based on rights subrogated pursuant to
20 section 112 by reason of payment of a claim may be com-
21 menced under this title more than three years after the date
22 of payment of such claim.”.

23 PRE-ENFORCEMENT REVIEW

24 SEC. 207(a). Section 113(b) is amended by adding “s”
25 to the word “subsection” and inserting “and (e)” after “(a)”.

1 (b) Section 113 is further amended by adding at the end
2 thereof the following new subsections:

3 “(e) No court shall have jurisdiction to review any chal-
4 lenges to response action selected under section 104 or any
5 order issued under section 104, or to review any order issued
6 under section 106(a), in any action other than (1) an action
7 under section 107 to recover response costs or damages or
8 for contribution or indemnification; (2) an action to enforce an
9 order issued under section 106(a) or to recover a penalty for
10 violation of such order; or (3) an action for reimbursement
11 under section 106(b)(2).

12 “(f) In any judicial action under section 106 or 107,
13 judicial review of any issues concerning the adequacy of any
14 response action taken or ordered by the President shall be
15 limited to the administrative record. The only objection
16 which may be raised in any such judicial action under section
17 106 or 107 is an objection to the response action which was
18 raised with reasonable specificity to the President during the
19 applicable period for public comment. In considering such ob-
20 jections, the court shall uphold the President’s decision in
21 selecting the response action unless the decision was arbi-
22 trary and capricious or otherwise not in accordance with law.
23 If the court finds that the President’s decision in selecting the
24 response action was arbitrary and capricious or otherwise not
25 in accordance with law, the court shall award the response

1 costs or damages or other relief being sought to the extent
2 that such relief is not inconsistent with the national contin-
3 gency plan. In reviewing alleged procedural errors, the court
4 may disallow costs or damages only if the errors were so
5 serious and related to matters of such central relevance to
6 the action that the action would have been significantly
7 changed had such errors not been made.”.

8 (c) Section 106(b) is amended by inserting “(1)” after
9 “(b)” and adding a new paragraph at the end thereof to read
10 as follows:

11 “(2)(A) Any person who receives and complies with the
12 terms of any order issued under subsection (a) may, within
13 sixty days of completion of the required action, petition the
14 President for reimbursement from the Fund for the reasona-
15 ble costs of such action, plus interest. Any interest payable
16 under this paragraph shall accrue on the amounts expended
17 from the date of expenditure at the same rate that applies to
18 investments of the Fund under section 223(b) of this Act.

19 “(B) If the President refuses to grant all or part of a
20 petition made under this paragraph, the petitioner may
21 within thirty days of receipt of such refusal file an action
22 against the President in the appropriate United States district
23 court seeking reimbursement from the Fund. To obtain reim-
24 bursement, the petitioner must establish by a preponderance
25 of the evidence that it is not liable for response costs under

1 section 107(a) and that costs for which it seeks reimburse-
2 ment are reasonable in light of the action required by the
3 relevant order: *Provided, however,* That a petitioner who is
4 liable for response costs under section 107(a) may recover its
5 reasonable costs of response to the extent that it can demon-
6 strate, on the administrative record, that the President's deci-
7 sion in issuing the order was arbitrary and capricious or oth-
8 erwise not in accordance with law. In any such case, the
9 court may award to petitioner all reasonable response costs
10 incurred pursuant to the portions of the order found to be
11 arbitrary and capricious or otherwise not in accordance with
12 law."

13 **NATIONWIDE SERVICE OF PROCESS**

14 **SEC. 208.** Section 113, as amended by section 207 of
15 this Act, is amended by adding after new subsection (f) the
16 following new subsection:

17 "(g) In any action by the United States under section
18 104, 106, or 107, process may be served in any district
19 where the defendant is found, or resides, or transacts busi-
20 ness, or has appointed an agent for the service of process."

21 **ABATEMENT ACTION**

22 **SEC. 209.** Section 106(a) is amended by striking the
23 phrases "or welfare" and "and welfare".

24 **FEDERAL LIEN**

25 **SEC. 210.** Section 107 is amended by adding after new
26 subsection (1) the following new subsection:

1 “(1)(1) All costs and damages for which a person is liable
2 to the United States under subsection (a) of this section shall
3 constitute a lien in favor of the United States upon all real
4 property and rights to such property belonging to such person
5 that are subject to or affected by a removal or remedial
6 action.

7 “(2) The lien imposed by this subsection shall arise at
8 the time costs are first incurred by the United States with
9 respect to a response action under this Act and shall continue
10 until the liability for the costs (or a judgment against the
11 person arising out of such liability) is satisfied or becomes
12 unenforceable through operation of the statute of limitations
13 provided in section 113(h).

14 “(3) The lien imposed by this subsection shall not be
15 valid as against any purchaser, holder of a security interest,
16 or judgment lien creditor until notice of the lien has been filed
17 in the appropriate office within the State (or county or other
18 governmental subdivision), as designated by State law, in
19 which the real property subject to the lien is physically locat-
20 ed. If the State has not by law designated one office for the
21 recipient of such notices of liens, the notice shall be filed in
22 the office of the clerk of the United States district court for
23 the district in which the real property is physically located.
24 For purposes of this subsection, the terms ‘purchaser’ and ‘se-
25 curity interest’ shall have the definitions provided in section

1 6323(h) of title 26, United States Code. This paragraph does
2 not apply with respect to any person who has or reasonably
3 should have actual notice or knowledge that the United
4 States has incurred costs giving rise to a lien under para-
5 graph (1) of this subsection.

6 “(4) The costs constituting the lien may be recovered in
7 an action in rem in the United States district court for the
8 district in which the removal or remedial action is occurring
9 or has occurred. Nothing in this subsection shall affect the
10 right of the United States to bring an action against any
11 person to recover all costs and damages for which such
12 person is liable under subsection (a) of this section.”.

13 **PENALTIES**

14 SEC. 211.(a). Section 103(d)(2) is amended by striking
15 “\$20,000” and inserting “\$25,000” in lieu thereof.

16 (b) Section 106(b) is amended by striking out “\$5,000”
17 and inserting “\$10,000” in lieu thereof.

18 **FEDERAL AGENCY SETTLEMENTS**

19 SEC. 212(a). Section 107(g) is amended by inserting
20 “(1)” after “(g)” and by adding the following new paragraph
21 at the end thereof:

22 “(2) The head of each such department, agency, or in-
23 strumentality or his designee may consider, compromise, and
24 settle any claim or demand under this Act arising out of ac-
25 tivities of his agency, in accordance with regulations pre-
26 scribed by the Attorney General: *Provided*, That any award,

1 compromise, or settlement in excess of \$2,500 shall be made
2 only with the prior written approval of the Attorney General
3 or his designee. Any such award, compromise, or settlement
4 shall be paid by the agency concerned out of appropriations
5 available to that agency. The acceptance of any payment
6 under this paragraph shall be final and conclusive, and shall
7 constitute a complete release of any claim against the United
8 States and against the employees of the United States whose
9 acts or omissions gave rise to the claim or demand, by reason
10 of the same subject matter.”.

11 FOREIGN VESSELS

12 SEC. 213. Section 107(a)(1) is amended by striking
13 “(otherwise subject to the jurisdiction of the United States).”.

14 TITLE III—AMENDMENTS TO THE INTERNAL
15 REVENUE CODE OF 1954

16 [Reserved]

17 APPLICABILITY OF AMENDMENTS

18 SEC. 401. The amendments made by this Act to section
19 104 (a) and (b) of the Comprehensive Environmental Re-
20 sponse, Compensation, and Liability Act of 1980 shall not
21 apply to releases listed as of January 1, 1985, in the national
22 hazardous substance response plan published pursuant to sec-
23 tion 105(8)(B) of that Act.